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THE LEGAL PROFESSION IN MADRAS.

I

Among the learned professions, the profession of law stands foremost in public favour in this country. As a means of earning one's livelihood it is the calling which is most largely pursued by young men leaving our Schools and Colleges. Medicine has no attractions. Outside the public service which affords room for a number of medical graduates and undergraduates, private medical practice is not sufficiently remunerative. English medicines are costly and so long as medical graduates are ignorant of the medicinal properties of indigenous plants and herbs and have not learnt to utilize them in their treatment of diseases, it seems unlikely that the people of a poor country will sufficiently appreciate modern methods of treatment so as to render private practice lucrative to the practitioners. As regards the public service, the appointments carrying large salaries are a close preserve for European medical men. The number of young men therefore that take up medicine as a course of study to qualify for earning a respectable livelihood is necessarily small.

Engineering as a profession affords no scope for young men beyond the needs of the Engineering department of the State. Fortunately the resources of the country have had to be developed in many directions. Coming in contact with a far higher material civilization, India has started upon a career of activity in public works which has absorbed all the available supply of our Engineering Schools and Colleges.

The State in its various departments is a large employer of labour. The Educational agencies in the country both foreign and native give accommodation to numbers of young men,

But the profession of law stands above all other spheres of employment. It has attractions which no other walk of life holds out to the aspiring young man. The handsome incomes it promises to successful talent, the rich prizes of official preferment it holds out to distinguished worth, the career of public activity and usefulness and the life of independence which it ensures, all these gilded by the hopes and aspirations of youthful imagination render the profession of law the common resort of most of the educated talent of the country. We propose to examine the condition of the profession, confining our remarks to the Presidency of Madras, though it may be, many of them may have equal validity in other parts of India.

It is a matter of common observation that the ranks of the profession are getting crowded everywhere. The principle of free trade and open competition which is a characteristic of many English institutions has been freely transplanted into this country and has obtained recognition in regard to admission into the profession. Even in England it is not now the eating of a number of dinners but the passing of an examination that qualifies a man for entrance to the bar. There is no limit to the yearly recruitment to the ranks, and any person fulfilling the general and technical requirements is called to the bar and set on his feet to shift for himself and elbow his way through the surging crowd of beginners. It may be that that system answers well enough in a country in which the profession of advocacy has an ancient history with the names of illustrious judges and advocates as beaconlights to inspire the heart of the beginner and with traditions of honour and independence to guide the erring youth. The question remains whether some limitations or restrictions may not be devised against the free admission of all who satisfy a merely intellectual test. There are qualities that an advocate must possess which cannot be summed up in mere watchfulness on his part against transgressing the provisions of the law. A strict regard for truth, a character for honour, quiet independence, courtesy and consideration and all the qualities which go to make up a gentleman are necessary qualities in every pleader. His duty to the public, his duty to the client and above all his duty to his own conscience require the exercise of all these qualities. No public examination can test the fitness of any man in these respects.

It cannot be said that there is nothing peculiar in the legal profession which requires in the person seeking to follow it the possession of the moral qualities we have referred to. Though truthfulness, honesty, and a high sense of honour may be said to be required in every member of society, they are peculiarly needed in the pleader who is brought into contact with the seamy side of human nature almost every day in his life. The temptation to swerve from the path of rectitude is great. The pecuniary inducements which are a salve to the wounded conscience and the prospective pleasures of success stand in the way of a strict adherence to the path of duty. Litigation brings the worst types of human character before the pleader and even the better sort of men present themselves in their worser moods. Crimes of all sorts, heartless rapacity, and fraud in all its numerous shapes are the daily atmosphere in which the lawyer lives and moves. It needs a particularly high character to withstand the adverse surroundings and to preserve the individual from being dragged to the dust.

Such being the requirements of the profession, it would be particularly important to devise some means of regulating the admission to the ranks by adopting some test in addition to the intellectual test which is prescribed, or by a course of instruction in the principles of professional rectitude. We shall see how far the tests now in force and the instruction afforded fall short of the needs of a proper standard of instruction.

II

There are five classes of legal practitioners in this country. The Attorney and Advocate who represent the division of professional work in England and the Vakil, are all of them practitioners called to the bar of the High Court. There are also first and second grade pleaders entitled respectively to practise in the District and Munsif's Courts of the country. A great deal is now being said in England and elsewhere as to a proper scheme of legal instruction fitted to qualify young men for the bar. Improvements have recently been made in England in legal instruction as given by the Inns of Court and the *Harvard Law School in America* stands forth as an example of a body of able professors & a well devised scheme of instruction successful in turning out lawyers of superior ability. The Lord Chief Justice of England recently addressed

himself to the task of setting forth a scheme of instruction calculated to imbue the students with the principles of law apart from the details of practice, a scheme the aim of which is to train up philosophic lawyers and to take away the reproach which is supposed to attach to English lawyers of being merely good *nisi prius* advocates. As regards the advocates of the High Court here, they are barristers of England, and Ireland or advocates of Scotland or Masters of Laws of the Local University who have been called to the bar of the High Court. We have nothing to say as regards the question of qualifications except that they are sufficiently high as regards the M. L. It appears to us that the Bachelor of Laws examination covers a sufficiently large number of legal subjects and requires in the student a good knowledge of the several subjects. It seems unwise and a waste of useful energy that a candidate for the M. L. examination should bring up the same subjects with some additions. The degree of proficiency shown by success in the B. L. examination supplemented by special learning, thought, and research in one or two departments of law ought to insure the possession of a higher degree; and we think we shall have a better class of M. L. advocates if greater depth with smaller range were required as the qualification for the degree.

The curriculum of studies for the B. L. examination seems to require little improvement. It is sufficiently comprehensive and the standard of the examination is sufficiently high to insure a good knowledge of law. We cannot however pronounce the scheme of instruction altogether satisfactory. The Law College in the presidency town consists of three professors and half-a-dozen assistants. The provision of assistant professorships seems to have been designed to give additional training to the students. We mean no disparagement to the present members of the staff when we remark that the present system of appointment of the staff makes it difficult to avoid the selection of men of doubtful competence. The Law College yields a large income and there is strong proof of the popularity of the profession in the fact that there are as many as 300 students in each of the three classes. The College is entirely self-supporting. If the College were intended only as a provision for legal practitioners, there would be no justification for continuing the same half-a-dozen men session after session in their places. We think the system deserves to be

thoroughly overhauled. A principal with a staff of professors each of whom is selected for special proficiency in some department of law is likely to manage a legal institution with far better results than can be shown by the present system. The lawyer confined only to one topic as the subject of special study is likely to be able to give correct and useful information to the students and train them with more efficiency in legal reasoning.

If the M. L. examination did not cover such a large field of subjects as it now does and we had masters of law graduating only in particular departments, there would be no difficulty in finding a sufficient number of able men to fill the chairs with distinction.

The Bachelor of Laws after a period of apprenticeship for one year under a practitioner of the High Court of a few years standing is qualified to be called to the bar of the High Court as a vakil and the M. L. after an apprenticeship of 18 months may become an advocate. A period of instruction of one year is prescribed for the first grade pleadership and on passing the examination in the 1st or 2nd grade, a person is at once qualified to practise as a pleader. As regards the apprenticeship of the would-be vakil, there have been some regulations made recently. While they ensure more or less diligent attendance at the High Court and the keeping of a number of books, they do not seem to prepare the student either on his moral or intellectual side for success in his career at the bar. It seems to us that a change of very dubious advantage was made when it was ruled that no practitioner should have more than two apprentices. The result of the regulation has been to distribute the apprentices among a larger body of practitioners, but it has not tended to improve their chances of acquiring a better training in the work of the profession. This restriction as to the number of apprentices that a pleader may take, has driven them in some cases to younger and inferior men insufficiently equipped in the matter of legal libraries and not well imbued with the best principles and traditions of the profession, men who make a living by resorting sometimes to questionable devices to gather a clientele. What the apprentice is expected to learn during that period is a better knowledge of the practice of the profession, matters of routine which every lawyer ought to be acquainted with, rules as to stamps and Court fees and the mode of calculating the period of limitation; the actual work-

ing of the rules of evidence in their application to examination, cross-examination and re-examination, how much the success of a case depends upon previous preparation before the trial actually comes on, the adroitness and skill in the management of causes of leading counsel, the tactics of cross-examination, courteous, gentlemanly and independent conduct at the bar, friendly courtesy towards brother-members of the profession, uniform and unfailing respect to the Court, ability to state a case in a simple attractive manner, the art of carrying conviction by logical reasoning and clear presentation, where and how to find out authorities for a given position, these and a number of other things too numerous to mention, and above all, a strict regard for truth and accuracy of statement and a high sense of morality in accepting engagements on behalf of clients and conducting the cases which have been taken up. That qualities like these are likely to be present in a higher degree in the successful leader than in a comparatively struggling junior goes without saying. It seems to us therefore that the rule which limits the number of apprentices which a person is entitled to take may tend to deterioration in the quality of the training which apprentices ought to receive before they are called to the bar. As regards first and second grade pleaders it seems to us that a period of apprenticeship should be prescribed as a qualification previous to their enrolment. It may not be inappropriate to require the apprentices to produce a certificate that they have qualified themselves as regards the practice of the profession by the study of the various matters we have referred to above, or that they have read some specified books dealing with the matters enumerated.

III

Having dealt with the qualification for enrolment as a member of the profession, we now proceed to consider the state of the profession in this Presidency and the dangers and difficulties that beset the path of the junior. The first question which one called to the bar has to answer for himself is to how to get on. If he settles in the Presidency Town, has he got rich and influential connexions in the Mofussil? Has he got friends amongst the leading and successful practitioners in the Mofussil Courts? Is there any leading member of the bar who will take him in hand for some time before he feels the ground firm under his feet? If he has got none of

these helps to start him in his career, his intellectual qualifications, his legal attainments, and his ability as a speaker may have to rust for some time. The ranks of the profession are crowded and getting more and more crowded every day. It is no doubt a survival of the fittest, the fittest not merely intellectually, but the fittest physically, intellectually and morally and in the possession of other adventitious aids. If he resolves to settle in the Mofussil, he has again to select a place, in which there are people willing to give him a chance. There are parts of the country, some Districts, in which the lawyers are not a particularly brilliant set of men to which an ambitous young man having a knowledge of the language of the District may go. Some men, there are, who feel tempted to adopt questionable ways to secure a certain quantity of business. We have heard of men who make it a point to write to pleaders in the Mofussil or to parties who may happen to have business in the Courts, to engage them. Traditions of honour and respectability, the profession in this country, has not. There are no stories of great men who struggled on in the path of rectitude amidst numerous difficulties and achieved professional distinction in the end. It is not as generally known as it ought to be that it is discreditable for a lawyer to advertise himself or to solicit business in any way. There are vakils, we have heard of instances of professional men, who have gone about during the recess of the Courts visiting their clients in various parts of the country or pleaders of a locality to make friends with them. There can be no doubt, such practices are reprehensible and no English Barrister will consider the conduct as anything but discreditable.

There is even a worse form of picking up business, which consists in the payment of touts to bring in legal business. The practice is condemned by the Legislature and was penal till recently *i. e.* till the enactment of the New Legal Practitioners Act. There are vakils who have not been convinced of the immorality of the procedure, though they admit that being *mala prohibita,* not *mala in se* they are bound to refrain from such practices. If there was a traditional feeling that touting and the encouragement of it in any form was objectionable, it would not require argument to convince the profession of the baneful character of the practice. It seems to be regarded as on a par with the system of brokerage

employed by merchants to secure customers and not morally reprehensible. It is forgotten that professional skill or the absence of it being not so easily discoverable as the quality of articles of merchandise, brokers in the legal profession are likely to mislead the client population, while brokers among merchants can only serve as advertising media. There is no doubt that a better appreciation of the rule prohibiting the encouragement of touts is becoming prevalent in the ranks of the profession. The struggle for existence is keen and the professional body has not become sufficiently jealous and watchful and possessed of a strong *esprit-de corps* so as to ferret out any lapses on the part of individuals and bring them to punishment. Within the last ten years, we have ourselves seen a great change among the Vakils of the High Court. At the beginning of this period, we could mention several instances, even among the better class of practitioners, of encouragement of touts on the sly. In some cases touts are retained in service under the guise of clerks. In others instead of a payment for each case, a sort of honorarium is paid to the tout at occasional intervals. There are other instances again where the pleader pleads some cause gratis for the tout, the fee having been pocketed by the latter. It is needless to unmask this species of corruption in its various forms, but there is no doubt that it exists in many Districts, though perhaps in the Presidency Town it has diminished largely. The business in the Small Cause Court is considerably in the hands of law-touts. Many a practitioner of that court, openly or slyly encourages the dalal. The Legislature has recently attempted to put down the body of law-touts by enacting that lists of them may be prepared by District Judges and hung up in the court-house, to warn practitioners against accepting engagements from them. So long as the morality of the profession has not been distinctly raised, it will be impossible to exterminate a class which feeds upon the lower nature of legal practitioners. The problem should be how to raise the standard of morality among them and one of the means we have suggested towards this end, is to enable the body of legal practitioners in each district to incorporate themselves and to arm them with certain powers of investigation and report against erring members of their body.

Another danger to which the young practitioner is likely to succumb is that of accepting any engagement, provided it is suffi-

ciently remunerative. We know not many gentlemen who will refuse a handsome fee, if they are asked to appear in support of a prosecution which they know or strongly believe to be unjust. And yet we have no doubt as to what the dictates of morality are in such a case. It is often said, and we remember the celebrated words of Lord Brougham in his speech in defence of Queen Caroline, that the advocate has no business to judge of the justice or otherwise of his cause, that he is the servant of his client and that he must do his very best in support of his client's cause. The language of Lord Brougham has not been approved of in recent times. A great storm raged in England against the conduct of Mr. Phillips in defence of Courvoisier for the murder of Lord William Russell. The prisoner had confessed his guilt to his counsel who was in great difficulty as to the course he was to adopt as regards the defence. He consulted Baron Parke, the presiding judge, who advised that his duty was to go on. There was a strong public condemnation of the counsel in the newspaper press for what he was supposed to have done in the conduct of the defence, namely an assertion of his knowledge of the innocence of his client. But the learned counsel repudiated the charge and he was supported by Baron Parke. To appear in defence of a prisoner is a different thing in some respects from appearing in support of the prosecution. The prisoner should be condemned according to the laws of the realm and in accordance with its forms, and the counsel, it is said, is entitled to avail himself of every loop-hole which the law allows in support of his client. It is, however, a different thing to prosecute a man to punishment with knowledge of the injustice of the prosecution. The whole question is regarded as if the counsel had no soul or no conscience, as if he was a machine, a conduit pipe, merely to transmit whatever was to be said in support of his client. So long as the institution of advocacy is a part of modern civilized judicature, it is argued, that a counsel is bound to appear for and conduct any unjust cause in accordance with the forms of the law. Even giving the greatest weight to this argument, it seems there is a great mistake in overlooking the deteriorating influence such engagements will have on the moral sense of the individual. It may be that the calling of a hangman is a necessary institution in a political society; but it is not ennobling to the character of the individual who does the duty.

A man familiarised with this double life, believing one thing in his heart and repeating another in public, has a very bad education for nobility of character or rectitude of conduct. Nor is there any necessity, even in the interests of an unjust claimant or prosecutor, that counsel knowing or believing in the injustice should appear for him. The profession is a large body and there may be other men equally eminent who may not know or believe in the injustice of the cause. The cause of the client would not suffer and the character of the counsel would be saved by the former seeking other aid. The young practitioner, therefore, has early to steel himself against the attractions of a good fee in support of a bad cause.

We have to warn the young practitioner against another practice which is unfortunately too common in the country, of professional men directly or indirectly suggesting false evidence or wilfully shutting their eyes to the subornation of false evidence going on under their very noses. Everybody will agree, and there is no question of casuistry involved in the matter, that the lawyer is unworthy of his profession who panders to the needs of his client by prostituting his skill and intelligence to manipulate the evidence whether it tends to fill the pocket of his client or to save his neck. We believe that this great evil and most serious blot upon the profession, which fortunately is confined only to the conduct of original trials, is much more largely prevalent than people are likely to give credit for. All the worst things that have been said of the legal profession in other countries seem to a great extent true of a large majority of those who are engaged in the conduct of original litigation. Except at the original side of the High Court, there is no differentiation between the duty of pleading and that of acting which marks the two-fold division of the profession in England into Barristers and Attornies where all the work which is likely to degrade or tarnish the fair fame of the profession is done by the attorney, the barrister not being approached by the client himself under any circustances. Such a system saves the character of one class at the expense of another. But if what we have read of the great improvement in the tone of morality of attorneys in England be true, the blot on their escutcheon has been nearly wiped out. All the practitioners in this country throughout the mofussil who appear in the conduct of original trials have to deal with witnesses. And if we remember the fact that of the men who attend

the courts as witnesses in any country, the class of which it can be said that it is incapable of uttering a false-hood is not very wide, the temptation to which the young practitioner is exposed of being the willing or unwilling abettor of perjury is great. The client is generally an ignorant person. He wants to know how he is to prove his case. A mind legally trained knows the nature of the proof that will be needed in support of the cause. The pleader asks whether the client has got this or that piece of evidence and the client who is generally not very scrupulous, answers *yes*, and the proof is produced. This is the most innocent aspect of the matter that we can present; but the more shady picture is still behind. The witness is brought, he tells his story, but the pleader is not satisfied that it is up to the mark; and he expresses his dissatisfaction. The witness goes back and returns the next day better prepared and the pleader is better pleased. Can we acquit the pleader of being privy to the falsehood? It may be possible. It may be that the witness being thrown again upon the resources of his memory has refreshed his recollection and is honestly able to give an improved version. But even this is nothing. Apart from actual tutoring of which we know several pleaders are guilty, apart from actual suggestion of false evidence, though it may be to prove a true case, there are lighter shades of misconduct to which apparently respectable pleaders are parties and they lay the flattering unction to their souls that they are in no sense responsible for the perpetration of the falsehood. Nor can we approve of the conduct of pleaders, we are using the term in a generic sense, who continue to conduct the case and appear for the client even though they are aware that the witnesses whom the client is putting into the box have been paid by him; or that his client has paid and bought over a witness of the opposite side who is going to be placed in the box or that witnesses on his side are being trained and tutored, and brought up to him to receive the finishing touch. Notwithstanding the fame and money that success may bring, such a lawyer is not worthy of his great calling. It is very difficult indeed to do your level best for your client, to be zealous in support of his cause, to be eager and watchful against snares and pitfalls in the way, to be passionately eager for victory and at the same time to keep your conscience perfectly pure, to be free from even the suspicion of malpractice and to preserve your

character for honour and truth unsullied. Unless the man has got the moral backbone to steer clear of this danger and to do his duty by his client and retain his character for truth, let him have nothing to do with original trials, or anything connected with them except the examination in court. Recent trials, there have been in some of the moffusil districts, in which leading lawyers have been engaged, where the amount of perjured testimony on each side has been almost unparelleled even in the judicial annals of this country. Practitioners whose good fortune it is to confine themselves to appellate work are placed in a position of absolute freedom from temptation.

There are minor matters on which a word of caution may not be inappropriate. It is too much the fashion to suppose that cross-examination is a great thing in original trials. Cross-examination undoubtedly appeals to the imagination. It is moreover conducted in the presence of the public assembled and calculated to elicit the praise of on-lookers or their ridicule. But the real work of the lawyer has to be done by him before the trial commences. It is commonly supposed that the breaking down of a witness in cross-examination is a splendid performance. The more able though less brilliant performance is the eliciting from the witness of the opposite side all the points he could speak to in your favour, and previous study and deliberation are necessary that you may know what those points are and how to elicit them. As a part of the same fallacy, it is believed that you are at liberty to attack a witness's character and to tear it to tatters by bullying and browbeating him. The witness performs a public function, for, if honest and truthful, he has no ends of his own to serve, and though any man may avoid being a plaintiff or escape being made a defendant, it may not improbably fall to his lot to be a witness. Remembering, therefore, that the witness occupies his position in the box under compulsion of law, you should treat him with consideration; and though he may speak adversely to your client, you should not unnecessarily outrage his feelings. This is a solemn duty which the pleader owes to the public.

A common fault of young practitioners which we have noticed is the failure to study before-hand not what to say, but how to say it. Inattention to this simple requisite makes sometimes all the difference between success and failure in the cause. It is not that

this rule has to be carefully borne in mind merely when addressing a jury. The rule is equally applicable in the case of a judge though the style of argument must necessarily differ in the two cases to some extent.

There is a vulgar saying that a lawyer should get-on, get-on-er (honour), and get-on-est (honest). This represents the truth in many cases. But if the profession is to command the respect and confidence of the community there is no doubt that the lawyer should seek to get honour through honesty.

It is a common fault of many practitioners to be loose and inaccurate in the statement of facts. It is sometimes considered a part of cleverness to be able to conceal truth and to pass off garbled versions of the facts upon the Court, more especially if the opposite side happens to be represented by a weak or junior practitioner. This is surely not the road to acquire the esteem of your brethren of the profession. In the long run such men are detected; and the judge learns habitually to distrust them. One rule of conduct until you are detected and another rule after detection, is not a wise rule of policy. The strictest regard for truth should prevail in all statements of fact made to the Court.

There are various rules of professional etiquette of which the large majority of practitioners have no knowledge. There is no tradition in the profession as regards them. And one's own good breeding and his character as a gentleman, are the sole guides to enable him to determine what line of conduct he should pursue in a given situation. Many of these rules are apparent to common-sense and you can easily reason yourself to an acceptance of the rest. These rules of professional etiquette are to be scrupulously observed.

It may be, we are not in a position to promise success to the practitioner who has regulated his conduct in accordance with the suggestions we have made, but we can assure him, he stands a far better chance of success than one who fails to adopt them...

IV.

We have dwelt so far upon the preparation of the young advocate on the moral side of his nature. His intellectual equipment begins of course with the examination that he has passed, but there is a great deal for further study. We have very few lawyers in this country entitled to a pre-eminent position in the profession. We cannot help feeling that after the examination is

once passed, there is no disposition among the practitioners to continue the general study of law apart from particular legal questions. The nature of the M. L. degree has also something to answer for.

In Bengal we can point to half-a-dozen men at least who have vindicated their title to superiority in special departments of the law, thanks to the Tagore Professorship. If there be a similar endowment in this part of the country, we doubt not that in course of time we shall have trained up a sufficient number of men able to fill the chair with credit. Notwithstanding the din of law and law-study we hear on every side, it is matter for regret that we should be so far below the highest level. The poor calibre of our Judges has, in some measure, to answer for the poverty of legal talent at the bar. For, an able bench and a good bar act and react upon each other and their generous rivalry produces the best results. It is a matter for sincere sorrow that the English portion of the bar is also weak. Notwithstanding a number of Government appointments which are a close preserve for barristers, and serve to keep up struggling juniors until they learn to stand on their own legs, the English bar has been declining steadily in talent and ability. And the Indian bar which sadly needs models of excellence in forensic advocacy, brilliant cross-examination and acute legal argument, does not possess them in the English bar. Speaking of advocacy, we must say that it has not been our good fortune to see very superior specimens of it.

The budding practitioner has therefore to grope his way amidst the surrounding darkness, thankful to the few guides that may occasionally light his path.

V.

We have now to consider the state of the profession in one of its most important aspects, namely, its character for independence. It is important to remember that that independence is very much an English feeling. It will be difficult for us to realize it, unless we acquaint ourselves with the history of the profession in England, how Somers and his colleagues defended the seven Bishops against an infuriated and revengeful sovereign and a corrupt and unprincipled Bench; and how Erskine regardless of the smiles of his Sovereign and the fury of the populace defended Gordon and secured his acquittal. In India the European

bar represents the traditions of English professional liberty. First, they are the countrymen of the judges, secondly, they meet them at the same table, they move in friendly relations with them outside the court-room and are consequently well understood by them. They have brought to this country the memories and the traditions of professional honour and independence in their native country and the presiding judges who are bound to treat them with courtesy and consideration are trained and prepared to extend the same feelings of good will and kindness to the Indian members of the bar. The latter labour under several disadvantages. They are not the countrymen of the judges who preside over the more important courts of the country. They do not meet them in friendly intercourse at the table and in the ball-room, or at the club or in the cricket field and have not, therefore, the opportunities of being well understood.

The European Judges, moreover, in this country are unfortunately not recruited from the profession and do not share the feelings and aspirations of the members of the Bar and cannot, therefore, enter into the difficulties of their position. It is no wonder, if amidst these circumstances the most cordial relations between the Bench and the Bar do not prevail throughout the country. The Civilian Judge, transferred from department to department to be trained into a good all-round man, accustomed to dispose of his work with rapidity in his chamber, reaching his conclusion at all hazards without reference to nicety of reasoning, feels greatly impatient of what he begins to regard as the troublesome interference of the legal profession. The Legal Practitioners' Act which requires a pleader to renew his certificate qualifying him to practise every year, and the rules based upon it which require the production of certificates of good character from the presiding judge for each renewal of certificate are calculated to seriously impair the independence of the pleader. A levy of an annual fee for renewal of the certificate may be nothing more than a species of taxation. The requirement of a certificate from the judge places the pleader in a position which necessitates his courting the favour and humouring the prejudices of the authorities even to the extent of sacrificing the interests of his client. This requirement of the rules under the Legal Practitioners' Act ought to be done away with. While dishonorable conduct should at all times

be visited by the most condign punishment, for which there is ample provision in the Act, the pleader should not be placed in constant dread of displeasing the judge. A judge who is unfamiliar with the forms of judicial procedure, and whose soul is vexed by the delays of examination, cross-examination, and re-examination sanctioned by the law, is too often apt to be displeased with the pleader insisting upon the full measure of his rights.

We cannot have a thoroughly independent Bench, so long as the system under which judges are appointed permits their transfer from one class of duties to another, so long as their prospects of promotion depend upon the good will of Government and so long as judges are members of the Civil Service governing the country which is permeated by a strong *esprit de corps.* The independence of the Bench is not likely to become a question of prominence except at occasional times of popular excitement, racial indignation, or Government persecution. It is not on ordinary occasions, that the independence of the Bench or of the Bar becomes a matter of public observation. There is no need for the exercise of the higher qualities of your nature except under stress of peculiar circumstances. If passion or prejudice or influence can operate upon the minds of the judges, they are imbued with a feeling of partizanship which places them in collision with the profession. If on those occasions you have not an able and upright Bar, if the Bar however able and upright, be liable to the consequences of the displeasure of the Bench, bold and independent action, fearless of consequences, cannot be expected from the profession. As for the Bench, even our High Courts have not been free from the suspicion of pliability to suit the wishes of Government. It is an open secret how, not very long ago, the members of the Government seriously deliberated upon packing the bench to secure a particular verdict and District Judges and District Magistrates have been known merely to carry out the behests of Government apart from the justice of the cause or the evidence placed before the Court. So long as such things are possible in the Bench and there is no strong public opinion to overawe the Government, the Bench and the Bar against wrong-doing, professional independence can be nothing but a name. The maintenance of a strong European Bar which from racial and other causes will know how to compel respect

for its rights is a necessary condition for a long time to come of the general independence of the profession. We hear occasionally of the whole Bar of a place refusing to appear for a man because he is in bad odour with the presiding judge. We have heard of leading vakils declining to appear in defence of the prisoners during the time of the Salem riots, because every such vakil was a marked man in the eye of Government. Much of the weakness and the fear is due to the absence of moral elevation in the individuals composing the class. If each individual pleader will educate himself to a proper appreciation of the dignity of his calling, we have no doubt that young practitioners of the future some of whom, we hope, will have breathed the free atmosphere of English life and of the English Bar will be placed amidst surroundings which will contribute to the maintenance of a high level of professional independence.

In following the career of the young lawyer eager to achieve fame and distinction in a profession in which are centered the hopes and aspirations of more than fifty per cent. of the rising youths of this country, and in finding out the difficulties he has to contend against and the dangers against which he has to guard himself, we have given a description of the state of the profession as it is. Hundreds of young men are added every year to the ranks of the profession in all its grades. They come to it with great hopes; some of them are no doubt destined to realise them and the large majority will be surely disappointed, and sink to the level of hewers of wood and drawers of water. If amidst all the changes and chances of the future they shall have laid by a sufficient stock of moral principle to withstand the ignoble temptations of their career, they will have nothing to be ashamed of at the end of their lives' journey. The profession is called an honourable one—and honourable no doubt it will be if the men who practise it are determined to keep it so, to leave a heritage to their successors which their predecessors in other lands and climes have handed down to them, unsullied by anything mean or low. In the matter of emoluments, there is no walk of life, certainly no profession, which holds out more brilliant prospects to the most successful. In the Councils of the State, on the public platform and in the public press lawyers are destined to occupy the formost place. As the price of all these advantages the profession expects, love of truth, devotion to duty, assiduous labour and fearless honesty.

HINDU LAW—RIGHT OF REPRESENTATION UNDER THE MITAKSHARA.

The right of representation is a subject usually dealt with in works on Hindu Law, but its exact scope has nowhere been clearly laid down. That the right exists in the case of co-parcenary property within certain limits is indeed mentioned by all text-writers. With regard to such property the rules of inheritance have no application, and survivorship and partition are the principal incidents to which it is subject. It is at the time of partition of such property that the doctrine is applied for the purpose of determining the shares to which individual members may be entitled. Whether the principle applies to any case of inheritance proper and whether it can be invoked in reference to the succession to a lineal male ancestor within three degrees, who, in his life-time became divided from his descendants or who dies leaving self-acquired property is a matter on which there is hardly any discussion in the text-books. The want of clearness in the treatment of the subject is partly due to the unsystematic way in which the Mitakshara as a commentary on the text of Yajnavalkya is obliged to treat it and partly due to the fact that the problems which now confront us had not engaged the attention of text-writers. The subjects of partition and inheritance are not separately dealt with in the Mitakshara and we find in the chapter devoted to these topics the distinctions between obstructed and unobstructed heritage, ancestral and self-acquired property, and joint and separate property jostling each other in confusion. In fact, succession by survivorship and succession by inheritance have no separate words to denote them, but are both expressed by the same word *Daya* which has been translated by Colebrooke and other writers as heritage. The scheme followed by the Mitakshara in the chapter on Inheritance appears to be this. The author takes into consideration a typical Hindu family consisting of a father, his sons, and the sons of his sons and discusses their respective claims to the family property. The father is assumed to be separated from his collaterals, as it is unnecessary to complicate the subject by introducing their claims and as the rights of brothers as collaterals to coparcenary property have to be treated in discussing the rights of the sons in the family estate. As self-acquisition is an exceptional state of things, the property in the father's hands would ordinarily be ancestral property.

The first thing to be discussed in regard to such property is, whether the son and grandson acquire an interest therein by birth, and if they do, whether the coparcenary property can be reduced by them to severalty and under what circumstances. A partition may take place either during the life-time of the father who is the head of the family, or after his death. If it takes place during his life-time, it may be with or without his consent. If the father dies before partition, the other members succeed to his share by survivorship and are entitled to divide the whole coparcenary property including his share. They are not however bound to bring into hotch-pot any acquisitions made by them separately without detriment to the paternal estate. If any of the brothers have died before partition, leaving sons or grandsons, the latter take the place of their fathers or grand-fathers as the case may be, and take the shares to which their ancestors would have been severally entitled, if they had been alive at the date of partition. If the individual, the devolution of whose property we are tracing has no male descendants, his property will be inherited on his death by his wife, daughters, and other heirs mentioned by Yajnavalkya in the order prescibed. The other subjects that are dealt with in this chapter are treated only as incidents in the course of devolution we have followed. The point of view which we have assumed the author of the Mitakshara to occupy is the only one which discloses a plan in his treatment. Survivorship and inheritance, both find a place in this scheme and hence the comprehensive title *Daya-vibhaga.* The word *Daya* is defined by the author of the Mitakshara to signify wealth which becomes the property of another solely by reason of relationship to the owner. At first sight, it might seem that the definition is intended to include only property in which a right is acquired by birth and does not include cases in which relationship is not by itself effectual to create a title, but some additional circumstance is required to exist. But the fact that *sapratibandha daya* or obstructed heritage is also included in the term *Daya* shows that the word is used by the author in a more extended sense, than the language of his definition would suggest.

Now what is meant by the right of representation? It is the right which the male issue of a deceased co-parcener have to represent the rights of their ancestor to a partition and claim the share which he would have taken at a partition, (Mayne's Hindu Law

S. 432). It is said that the right of representation exists in regard to all unobstructed heritage and that it prevents the application of the rule that the nearer heir excludes the more remote (*Muthu Vaduganatha* v. *Periyasami*, I. L. R., 16 M, 11). We have therefore to inquire what is meant by unobstructed heritage. *Aprati bandha Daya* or unobstructed heritage and *Saprati bandha Daya* or obstructed heritage are thus explained by the Mitaksharai:—"The wealth of the father or of the paternal grandfather becomes the property of the sons or grandsons in right of their being his sons or grandsons and that is an inheritance not liable to obstruction. But property devolves on uncles, brothers, and others upon the demise of the owner, if there be no male issue; and thus, the actual existence of a son and the existence of the owner are impediments to the succession; and on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction" (Mitakshara I. ii. S. 3). According to the Vyavahara Mayukka where the life of the owner of the property or that of his sons &c. is interposed, that wealth is called *Saprati bandha*; but where ownership accrues to sons &c., from relationship to the owner without the necessity of having recourse to other means of acquiring wealth, that is *Aprati bandha*, for example the father's wealth (*Mandlik's* V. *May*, 33). The author of the Viramitrodaya remarks that as the ownership of the sons &c., in the property of the father and the like accrues from the very birth through the relation of sonship &c., although the (previous) owner such as the father is alive, it is their unobstructed heritage, the existence of the (previous) owner constituting no obstruction (Viramit p. 3 Ch. I S. 5). There is a long disquisition in the Mitakshara following the passage we have quoted and it is stated in conclusion that in the property of the father or the grandfather, ownership is by birth. Unobstructed heritage is the consequence of the right by birth which is alleged to exist in the case of sons, grandsons and great grandsons. The right of representation thus becomes co-extensive with the right by birth and with unobstructed heritage. The doctrine of right by birth is the most fundamental in the Mitakshara school and it requires careful examination to ascertain its limits. Let us see what right by birth implies. It involves, firstly the existence of some property in the hands of the father, grandfather, or great grandfather to

which it can attach; secondly, the accrual of a vested right in such property to the new member; and thirdly, the consequent curtailment of the interest previously possessed by the father or other ancestor in such property (*Debi Pershad* v. *Thakur Dyal* I. L. R., 1 A. 135). It is a necessary consequence of the right by birth that the owner of the right should have the right to restrain alienations by the father or other ancestor and the right to enforce partition at least in cases in which he is not obstructed by the existence of an intermediate ancestor. It is difficult to conceive of a right by birth where the requirements mentioned above are not satisfied. As laid down by the Privy Council in *Rani Sartaj Kuari* v. *Rani Deoraj*, (I. L. R., 10 A. 286) property in the paternal or ancestral estate by birth under the Mitakshara is so connected with a right to partition, that it does not exist where there is no right to it. Right by birth as defined above arises only in regard to the ancestral property of the father, grandfather, or great grandfather. Where a man has inherited or acquired by survivorship any property from his three immediate lineal male ancestors, it is regarded as ancestral property in his hands and his male issue to the third degree acquire rights in it by birth as against him. For this purpose it is immaterial whether the property which he has inherited or acquired was the self-acquisition or ancestral property of the person whom he has succeeded. Even self-acquired property, after it has been once inherited, becomes ancestral as against the issue of the heir. Property which is self-acquired in one generation ceases to be so in the next and becomes ancestral. And as the male issue of a man acquire rights by birth against him in ancestral property, a co-parcenary is formed consisting of the man and his descendants to the third degree and the property becomes joint or co-parcenary property. In regard to ancestral property the doctrine of right by birth obtains full scope and the successive acquisition of interests in it by sons, grandsons and great grandsons constitutes unobstructed heritage. The word heritage is rather open to objection, inasmuch it suggests the idea of inheritance on the death of the ancestor.

As regards self-acquired property, the case is entirely different. A man's issue have no legal rights against him in regard to his self-acquisitions. He may alienate it at his pleasure without consulting his sons and may dispose of it by will in any

manner he likes. His sons have no right to question his dealings and no right to claim a partition against him. The only right which the sons have in regard to the self-acquired property of their father is a right to succeed to it on his death, if he has not already disposed of it by will or *inter-vivos*. Such a right does not possess the necessary elements of a right by birth and can hardly be distinguished from the right by demise of the ancestor which obtains under the *Dayabhaga*. Though the Mitakshara states that the sons have a right by birth in the self-acquisition of their father, the right is reduced to such meagre dimensions that it can hardly be recognised as a right by birth. "Although he has a right by birth in his father's and in his grandfather's property, still since he is dependent on his father, in regard to the paternal estate and since the father has a predominant interest, as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction (if the father be dissipating the property) [Mit. Ch. I S. 5 p. 610]. To make the son's position clearer, let us take the case of a father making self-acquisitions after the birth of his son. If the self-acquisition had been made before the birth of the son, there would have been some property in which it might be plausibly said that the son acquired an interest by birth. But where it is made after his birth, there is no property in existence at that date to which it can attach. If the right attaches to anything, it must be to the possibility of the father making acquisitions, a possibility that may never be realized. If, in this case, the son should have a son during the grandfather's lifetime, the grandson's position would also be anomalous. The grandson's right by birth attaches to the right of succession possessed by the son. If there is difficulty in considering the son's right to amount to a right by birth, there is equal, if not, greater difficulty in admitting the grandson's right by birth. If, however, the grandfather dies and his property descends to his sons, it becomes *ipso facto* ancestral against the grandson, and the grandson's right by birth which has been loosely floating hitherto fastens itself upon the property. Once it is inherited by the son, the property becomes subject to the right of the grandson. Where a man dies leaving self-acquired property and a son and a grandson by the deceased son, the right of the

deceased son to succeed never having been realized, and no right having in fact vested in the son, it is difficult to see how his son could acquire any rights. The grandson's right to represent his father would arise only where his father had acquired a right by birth. If his father had no right by birth, because it was the self-acquisition of the grandfather and he pre-deceased the grandfather without acquiring any right, he could not possibly transmit any right to his sons. Strictly speaking, the position of the son in regard to the self-acquisition of his father under the Mitakshara is exactly similar to that of the son in regard to any kind of property of the father under the *Dayabhaga*. Both under the Mitakshara and under the *Dayabhaga*, relationship to the owner is the ground of succession, but while under the latter the right accrues only on the death of the father, it accrues under the former during the life-time of the father. A son under the Mitakshara has no legal rights against his father during his life-time in regard to his self-acquisition, any more than a son under the *Dayabhaga* has against his father in respect of any kind of property. The doctrine of right by birth under the Mitakshara must therefore be confined to ancestral property and the texts of the Mitakshara quoted above which speak of the sons having a right by birth in the father's self-acquisition must be taken to refer to the moral claims of sons to be maintained and provided for by their fathers even out of their self-acquisitions. Text-writers on Hindu Law have also taken the view that the doctrine of right by birth must be confined to ancestral property, though they are not always consistent with themselves. Mr. Mayne says (S. 250, Hindu Law) that the same principle, their property vests in certain relations by birth, gives rise to the division into unobstructed and obstructed heritage and also to the conception of a coparcenary. A coparcenary implies a right to restrain each other's dealings, a right to partition and to survivorship. The right by birth which gives rise to a coparcenary cannot be the same as the right by birth which is alleged to exist in the case of self-acquired property of the father or to be the cause of unobstructed heritage as defined by Mayne and which can be defeated by devise or alienation. Mr. Bhattacharjee remarks (Hindu Law 2nd ed. p. 210) that the necessary consequence of the theory of ownership by birth is that from the date of the birth the son becomes a co-owner with the father in the family property and

(p. 222) that the Mitakshara conception of joint ownership inevitably leads to the doctrine that in a joint-family succession takes place on the death of any member by survivorship and not by inheritance. The right of representation is discussed by Mayne (S. 432) only in connection with the subject of partition which implies that it is only in connection with property which has already become co-parcenary property that the right is applicable. It is not very clear from Mr. Mayne's treatise whether in his opinion a grandson by a deceased son would succeed to the self-acquisition of his grandfather equally with a surviving son. Under the *Dayabhaga*, the grandson would succeed in such a case; because denying as Jimutavahana does, the son's and grandson's right by birth even in the ancestral property of the father during the latter's life-time, he is obliged to put a forced construction on Yajnavalkya's text and compensate the son and grandson by a concession of a simultaneous right of inheritance on the death of the father. We shall first examine the modern text-writers and then the sanskrit texts and decided cases. Mr. W. H. Macnaghten states (Hindu Law p. 17 " & 18)" according to the Hindu Law of inheritance, as it at present exists, all legitimate sons living in a state of union with their father at the time of his death succeed equally to his property, real and personal, ancestral and acquired. The right of representation is also admitted as far as the great grandson . . . . . In default of sons, the grandsons inherit, in which case they take per stirpes . . . . In default of sons and grandsons, the great grandsons inherit, in which case they also inherit per stirpes." These passages appear to relate to the case of joint-family property and the author nowhere lays down the simultaneous succession of grandsons by deceased sons and of surviving sons to self-acquired property. Where self-acquired property has descended to sons and they live together and some of them subsequently die leaving sons, the grandsons would clearly be entitled to share with their uncles and their right is recognized in this passage. But Macnaghten does not discuss the case in which the father of the grandson had died before the succession to the grandfather opened. It is laid down in West and Buhler's Hindu Law (p. 77) "the separated house-holder being father of a family becomes the origin of a new line of succession within that family. His sons are by their birth joint owners with him of the ancestral estate in his hands, but he

has no other co-sharers in it and in the absence of sons, or after separation from them he is free to dispose of it; should he fail to dispose of his estate and die separated, his sons take equally, and failing sons, others take in the order following, sons, son's son, son's son's son. The three first descendants of a separate *grihasta* in the male line inherit per stirpes." This passage also apparently refers to ancestral or coparcenary property owing to the reference to separation and it is very doubtful whether even in regard to such property, it lays down the simultaneous succession of surviving sons and grandsons by deceased sons. In p. 363 Q, 17 however, in anwser to a question it is stated that the grandson by a deceased son is equally entitled with a surviving son; but it does not appear whether the property referred to in the question was ancestral or self-acquired. Professor *Sarvadhikari* says (Hindu Law of Inheritance 475, 478, and 481) that according to Mitra Misra the author of the Viramitrodaya, Nanda Pandita and Balambhatta, the son, the grandson and the great grandson are successively the heirs of a deceased owner. The passage is very enigmatical. It is not clear whether it refers to ancestral or self-acquired property nor does it appear whether the grandsons as a class take only after the whole class of sons has been exhausted, or whether the grandsons by each son take on default of their father alone, even though their uncles are living.

To turn our attention to the texts, we have already referred to the passages which affirm that a grandson has by birth a right in the estate of his father and of his grandfather. Right by birth in the father's acquisition is merely nominal and as to the right by birth in the grandfather's estate it will be shewn presently that it relates either to ancestral property in the hands of the grandfather, or self-acquisition of the grandfather which has devolved on the father and acquired the character of ancestral property. The texts which are chiefly relied on in support of the grandson's right are slokas 120 and 121 of Yajnavalkya and the Mitakshara Commentary on the same. The latter part of the sloka 120 is that "where there are sons by several fathers, the allotment of shares is according to the *fathers*." The Commentary of Vijnaneswara on this is as follows:—"Though the ownership of grandsons by birth in the grandfather's estate is not different from that of the son's, shares must be allotted to them in the grandfather's estate only through

their fathers and not in their own right. The effect of it is this. Undivided brothers having begotten sons depart this life; one leaves two sons, one three, and another four. Thus though there is an inequality of sons, the two obtain the one share of their father, the other three also obtain the one share of their father and so also the other four. So if some of the sons survive and some have died leaving sons, the same rule applies. The surviving sons get their own shares and the sons of the deceased sons obtain the shares of their fathers. This is the rule settled by the texts." (Mit. Ch. I S. V, 2) It is clear that this passage relates to the case of grandsons whose fathers were alive at the time of their grandfather's death and the opening of the succession and subsequently continued joint. Then follows a passage in the Commentary expressed in very obscure language which has given rise to a very keen controversy. The correct translation of the passage is given by Dr. Jolly and is as follows:—

"Supposing the father to be divided (from his co-parceners) or to have no brothers, shall the estate which has been inherited from the grandfather not be divided at all with the grandson in that case, because it has been directed that shares shall be allotted in right of the father if he is deceased (and not otherwise), or admitting partition to take place (in that case) shall it be instituted by the choice of the father alone. In order to remove the doubt which might be entertained, the author says" Mit. Ch. I S. 5, 3. The question which is propounded in this passage is the right of the grandson to claim partition from his father of the grandfather's estate after it has devolved on the father. Sloka 121 of Yajnavalkya is as follows: "The ownership of the father and the son is similar in land which was acquired by the grandfather or in a corrody or in chattels which belonged to him". The words father and son being correlative terms, the word son must according to the ordinary principles of construction refer to the son of the person who has inherited property from his grandfather. The grandson whose rights are discussed is the son of the surviving son on whom the estate has already devolved and not the son of a son who has predeceased his grandfather. The contest which this verse is intended to settle is a contest between a father and his own son and not one between an uncle and his nephew by a deceased brother. About the end of his commentary on this verse, Vijnanes-

wara says that a partition of the grandfather's wealth takes place at the instance of the son even against the wishes of his father and that if a father (divided from his collaterals or ancestors) makes a gift or sale of property acquired by the grandfather, the grandson has a right of interdiction. There is nothing, therefore, in these passages to justify the position that a grandson can succeed equally with his uncles to his grandfather's self-acquisition. Baudhayana says "male issue by males as far as the third degree, being left, the estate of the father must surely go to them" Colebrooke's Dig Vol III p. 195. The remark of Jagannatha that the co-ordinate right of a son, son's son and a son's grandson is thereby suggested, seems to be unwarranted. The text is merely intended to exclude others so long as any descendants within the third degree are left and does not regulate the succession among the latter. The text of Katyayana also evidently refers to ancestral or coparcenary property "when a son dies unseparated, his son who has not received maintenance from the grandfather shall be made participator of the heritage; he is to get, however, the paternal share from the uncle or uncle's son; the very same share shall equitably belong to all the brothers, or his son also shall get; afterwards cessation (of succession) takes place (Viramit II, p. 157). The Viramitrodaya, apparently deduces the co-ordinate right of a son, son's son, and a son's grandson from the doctrine of spiritual benefit. "It is clear that the three descendants equally confer spiritual benefit by offering oblations on the Parva occasions. Accordingly, Manu says, to three, must libations of water be given; for three, is the funeral oblation of food ordained. The fourth is the giver of them; the fifth has no concern." (Viramit S. 11, Ch., III. p. 155). As already stated it does not appear that the co-ordinate right of the son, and the grandson derivable from the assumption of an equality of spiritual benefit is applicable to any other case than that of ancestral property of the grandfather. Even if the passage can be construed as referring to such cases, the principle upon which the right is rested is a peculiar doctrine of the Dayabhaga school and not of Mitakshara and it appears to be questionable to import a doctrine foreign to the Mitakshara on the strength of an opinion in a work of authority only in the North-West-Provinces.

We shall now pass to the few decisions which have any bearing upon the subject under discussion. In *Muthu Vaduganatha*

Thevar v. Periyasami, I. L. R., 16 M. 11 there are certain observations by Mr. Justice Muthusamy Aiyar which at first sight appear to lay down the simultaneous succession of sons and grandsons. "As for obstructed and unobstructed heritage (*Saprati bandha* and *Apratibandha*), the distinction is material only to the extent that in the one case the nearer male heir excludes the more remote, whilst in the other the doctrine of representation excludes this rule of preference . . . . . . Thus the rule that to the nearest *sapinda* the inheritance belongs, applies alike whether the heritage is obstructed or unobstructed, with this difference *viz* that when the last full owner leaves sons, grandsons and great grandsons, their *sapinda* relationship confers equal spiritual benefit on him, though their blood relationship is not the same and that they are all co-heirs within the meaning of the rule." It has to be remarked in the first place that these observations were not really necessary to the decision of the case; secondly, that the specific point now discussed by us was not before the learned Judge for consideration; thirdly, that while the learned Judge lays down the doctrine of simultaneous succession in regard to unobstructed heritage, he does not lay down that unobstructed heritage arises in all cases in which an owner leaves sons, grandsons and great grandsons, irrespective of the nature of the property left by him; and fourthly, that it is not clear whether the grandsons referred to are grandsons by surviving sons or grandsons by deceased sons. In the case of grandsons by surviving sons they would of course acquire an interest in the grandfather's property at the very same moment at which their fathers acquire an interest and their interest though derived from their fathers would operate in curtailment of the latter's right. The only case in which there is a direct decision upon the point is *Luchomun Pershad v. Debee Pershad* I W. R. 317 in which it was held that under the Mitakshara law a grandson, his father being dead, shares equally with a son the self-acquired property of the grandfather. The point, however, does not seem to have been fully discussed or considered. It may also be said that as a matter of fact the grandson, and the two sons of the owner all seem to have been living as members of a joint family with the owner and that the owner had probably treated his acquisition as joint-family property, as it was open to him to do. In *Apaji Nar-*

har Kulkarni v. *Ramachandra Ravji Kulkarni*, I. L. R., 16 B. 29 there are certain dicta by the dissenting Judge Mr. Justice Telang in reference to this point. "Even when the property is the self-acquired property of the grandfather, the grandson by birth acquires a right to it even while it is yet on the grandfather's hands; such right is doubtless liable to be defeated by the exercise of the dominant right of the grandfather as the acquirer, but not being so defeated by any act of the grandfather, it attaches upon his property in the same way as the right of the grandfather's sons themselves. It is not a right to receive a share of that which the father may receive on a partition; It is a right in and to the property itself, like that of the father, and co-equal with it." These observations were only *obiter dicta* and after all they lay down only the quality of the interest possessed by a grandson and his surviving father in the grandfather's property and do not refer to the case of a grandson by a deceased son. Whatever interest the father of the grandson may acquire on the death of the grandfather, the grandson also acquires at the same time an interest in that interest. The grandson's right is in one sense co-equal with that of his father. So far, however, as it is said that the grandson's right is not merely a right to receive a share of that which the father may receive on a partition, and that the grandson and his father both have a right by birth in the grandfather's self-acquired property even during his lifetime, it is difficult for us with all the respect due to that eminent Judge to concur in his remarks. Apparently according to the learned Judge there are two kinds of right by birth. One in the case of ancestral property which involves a right to partition and a right to restrain alienations, and the other in the case of self-acquired property of the ancestor which is liable to be defeated by his dispositions. We have already pointed out that a right by birth which can be so easily destroyed does not deserve to be called a right at all; and the recognition of such a right by birth is altogether opposed to the decision of the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari*, I. L. R., 10 A., 272.

The general rule of Hindu Law in all cases of inheritance is as stated by Manu in Ch. 9 Verse 187, that to the nearest Sapinda the inheritance belongs. (I. L. R., 16 M. 14). Inheritance usually descends on one class of heirs and that the nearest, and not on

several classes of heirs. Where a person dies leaving self-acquired property it is a case of inheritance and not of succession by survivorship. It would, therefore, be in harmony with the general principle underlying the Hindu Law of inheritance that if in such a case the owner left sons and grandsons by deceased sons the former should inherit to the exclusion of the latter. An exception to the general rule is said to be introduced by the operation of the doctrine of representation and the doctrine of representation is alleged to exist in cases of unobstructed heritage. Unobstructed heritage as we have already seen is dependent upon, and a consequence of right by birth. Right by birth in the legal sense exists only in the case of ancestral or co-parcenary property and if the son or grandson has any right by birth in the self-acquisition of his grandfather or father, it is no more than a moral right. Neither the Mitakshara nor any of the Sanskrit Texts obtaining authority in the Mitakshara school applies the doctrine of representation in favor of the grandson by a deceased son in the case of self-acquired property. The only direct decision, if any, bearing on the point is one which does not fully discuss the question and is besides anterior to the decision of the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari*. There are no decisions subsequent in date to the Privy Council case, but only certain *obiter dicta* in two cases which cannot be said to be free from doubt.

Whatever doubt may possibly exist in regard to the succession to the self acquired property of the grandfather, there can be very little doubt as to the succession to the property of a grandfather who in his life time became divided from his son and has died leaving his separate property and sons and grandsons by deceased sons. The right by birth which is the cause of unobstructed heritage and which is said to give the grandson a right to the grandfather's property even while it is in the latter's hands must surely be destroyed by partition. It cannot continue to subsist after it has once been reduced into separate possession. The decision in *Ramappa Naicken* v. *Sithammal* I. L. R. 2, M, 182 offers no difficulty to our acceptance of this view. It merely lays down that a son who has been divided from his father is entitled to succeed to his father's share in preference to his mother in the absence of any undivided sons. It merely lays down that partition does not annul the final relation or the right of succession which is incl-

dental to that relation. There is no warrant for the position that right by birth such as is the cause of unobstructed heritage can continue to subsist, even after it has once been utilized and spent in obtaining a share of the property.

A. LAWYER.

DISHONEST INTENT IN THEFT.

The question we propose to discuss here is whether a taking of property out of the possession of the owner, without his consent, but only for a *temporary* purpose, falls within the purview of I. P. C., S. 378, and is theft. There have been conflicting decisions lately pronounced upon the point in the High Courts of Calcutta and Allahabad, thus leaving the law in an undesirably uncertain state.

In order to arrive at its true meaning, it will be necessary to enter into an analysis of the section (so far as the present question is concerned) into its constituent elements. The *mens rea* in this offence consists in the "intention to take *dishonestly*," which is according to S. 24, equivalent to "taking with the intention of causing wrongful gain to one person, or wrongful loss to another person"; and this latter again, by reason of S. 23, amounts to "taking with the intention of causing gain to one person, by unlawful means, of property to which the person gaining it is not legally entitled, or loss to another person, by unlawful means, of property to which the person losing it is legally entitled". Substituting for the words "gain," or "loss," the definitions of them contained in the 2nd para. of S. 23, the mental element of the offence (disregarding for the present the harshness of phraseology) comes to "taking with intention of causing acquisition or retention, to or by a person, by unlawful means, of property to which the person acquiring or retaining it is not legally entitled; or deprivation or a keeping out, to or from another person, by unlawful means, of property to which the person deprived or kept out of it is legally entitled." The dishonest intention in theft is, it will now be seen, divisible into three component parts: (*i*) Intention of acquiring or retaining, (*ii*) by unlawful means, (*iii*) of property to which the person so acquiring or retaining it is not legally entitled: or (*i*) Intention of depriving or keeping out another person, (*ii*) by unlawful means, (*iii*) of property to which the person so deprived or kept out of it is legally entitled. The words "acquiring," "retaining,"

"depriving" "keeping out" are, in their ordinary acceptation, applicable both to permanent and temporary acquisition, retention, deprivation or keeping out; and therefore these words must, *prima facie*, be taken to bear such meaning in S. 378, unless the context or some other reason requires a construction limited to a permanent taking. The explanations are silent upon the point, but illustration (*l*) throws light upon this question. The relation between the text of the Code and the illustrations was adverted to in the prefatory letter of the framers of the Code (Vide Higginbotham and Co's Draft Code p. XVI). The illustrations were not intended to override, but to elucidate, the sections. It therefore follows, that in construing the words "gain," and "loss," we must bear in mind the particular illustration referred to. It shows that a temporary acquisition for a particular purpose only constitutes a "gain," or "loss"; and that such acquisition by a person for the purpose mentioned, *viz.*, the intention of keeping the article taken until he obtains from the owner a reward, to which he is not legally entitled for its restoration, constitutes "*wrongful*" gain. In *Prosanno Kumar Patra* v. *Udoy sant* 1895, I. L.R., 22 C, 669, the learned Chief Justice says: "A consideration of this illustration shows that the person who is represented as taking the thing, takes it with the intention of appropriating it to his own use, and not merely of using it for a temporary purpose, in the same sense that a person who buys an article for the purpose of selling it again immediately, buys it in order to appropriate it to his own use, though he only intends to keep it for a very short time." But it is respectfully submitted that the analogy drawn is far-fetched. When a person buys an article, with a view to its immediate sale, it is true his possession of it may be very short, but his intention is to remove it from the vendor or owner *permanently*; whereas in illustration (*l*) the object is to remove the property from the owner only *temporarily*, with a view to return it to him. The state of mind, or the intention, with respect to the article, in the case of the vendor and of the taker, is not identical. The character of the acquistion is different. In one sense, indeed, the taker intends to "appropriate the article to his own use" as the purchaser appropriates to his own use the article he buys, but there is a wide distinction between the nature of the appropriation in the two cases. The taker exercises dominion over the article for his own benefit (*viz.* to obtain the reward), but he

intends the dominion to revert to the owner. His Lordship continues "In the case in the illustration, the taker takes the thing with intention of keeping it until he can exchange it for money or something else to which he is not entitled." But while the taker intends to keep it till he can exchange it for money or something else to which he is not entitled, he intends to obtain the money or something else *by returning* it to the owner, whereas the purchaser intends to exchange it for money or something else *by a sale* of the thing.

Illustration (*l*), in so far as it points to a temporary acquistion constituting "gain," is within the intent of the section: but, in so far as it goes further and points to the intention of keeping the property to improperly obtain a reward for its restoration as being the fact which constitutes "wrongfulness," and not the mere fact itself of taking the property by unlawful means, it seems to be wider than the language of S. 378, read with Ss. 23, 24, warrants. The gaining or the losing of the property by unlawful means must be of the property to which the person gaining it is not legally entitled (Vide S. 23). The natural meaning of the expressions "gaining it" "losing it," appears to be "actually gaining it," "or actually losing it," and thence it would follow that the gain or loss by unlawful means must be gain or loss of the identical property taken by the taker and which is the subject of the charge of theft, and that the expressions do not refer to other property which it may have been the more remote intention of the taker to obtain by his immediate act of taking the property which is the subject of the charge. Whatever be the meaning of these phrases in the first paragraph of S. 23, taken by itself, yet when taken in connection with the second paragraph of that section, and with the whole of S. 378, they refer exclusively to the property actually taken. In the above illustration, A, by the mere fact of taking the article from Z without his consent, he not being entitled to it in any way, appears to have "caused wrongful loss," and therefore to have acted dishonestly according to Ss. 23, 24. He has "acquired" the article, "deprived" or "kept out" the owner from its possession, though temporarily; he has done this by unlawful means, (*i.e.*, by taking the property without A's consent), and finally, he was not legally entitled to it in any manner. This appears to be sufficient under the sections to constitute theft.

But according to the illustration, it is not the taking, without consent, of the article, but the taking of it, without consent, in order to obtain a reward *viz.*, some *other* property which constitutes it a wrongful gain. The idea of referring "wrongful gain" to property other than the property actually taken also runs through several of the illustrations in the Draft Code of 1837 and cannot be reconciled with the conception of theft embodied in the definitions.

Thus according to illustration (*l*), it was theft for A to take his watch forcibly from a watch repairer, Z, if he (A) also intended recovering its value, though it is his own, and he does not owe anything to Z. But here A has only acquired the article (though by unlawful means *viz.* assault—Vide Draft S. 28—) to which he was legally entitled, Z having no lien on it, and, therefore, according to the old S. 363 read with Ss. 15, 16, his act does not seem to be theft at all of the property which is the subject of the charge against him. The case of illustrations (*m*) and (*n*), now illustrations (*j*) and (*k*), is theft, because A, in taking it back forcibly and without payment, took by unlawful means property to which he was not legally entitled at least till payment of the lien-charge. Illustrations (*q*) and (*z*) are open to the same remark as the present illustration (*l*). Illustration (*y*) appears to be theft, according to Ss. 15 and 16 of the Draft, as A had acquired Z's property by unlawful means, and it was property to which he was not legally entitled. A had no right in law to seize Z's property; he should have filed a suit and this was admitted by S. 460 which made it an offence for A to take the law into his own hands. If this view that the gain or loss referred to must be of the property actually taken, is correct, and the view is supposed by *Aradhun Mundul* v. *Myan Khan*, 1875, 24 W. R., 7 and *Queen* v. *Shoshee Bhooson Roy*, 1884 Shome 14 *per Glover J.* it would appear that the compilers of the Code have given to the word "fraudulently" in the Draft (Ss. 15, 16) and to the word "dishonestly" in the present Code (Ss. 23, 24) a technical meaning, but have, nevertheless, used them in the illustrations in the popular sense and hence the present difficulty of construction arises.

The argument adopted by the learned Chief Justice that by omitting from the present Code the provision contained in the

Draft that "a person may commit theft though he intends to restore the property after taking it," and by enacting such a clause in S. 403, it was intended to remove a taking with the intention of temporary gain from the scope of S. 378, would have had very great force, if illustration (*l*), formerly illustration (*o*), which was intended to illustrate the provision in the Draft referred to, had at the same time been expunged; but its retention tends to negative that inference.

So far as the authorities are concerned, the High Courts of Madras, Bombay, and Allahabad have held such taking to be theft, while the Calcutta decisions are conflicting. The Allahabad High Court has recently decided in *Queen Empress* v. *Aga Muhammad Yusuf* 1895, I. L. R., 18 A. 88, following *Queen Empress* v. *Someshar Rai*, W.N., 1888 (A) 97, and dissenting from *Prosonno Kumar Patro* v. *Udoy sant*, that a removal by a creditor, against the will of the debtor, of property belonging to such debtor, with a view of compelling him to discharge his just debt, amounts to theft. The creditor acquired his debtor's property to the latter's detriment by unlawful means, and was not legally entitled to it. The law gives the creditor a remedy by way of suit, but does not confer on him a lien on the debtor's property, so as to entitle him to seize it in satisfaction of the debt, though it be a just one, or to compel the debtor to discharge the same. Hence the decision is right. The Madras High Court has also held that a creditor, removing property of the debtor, without his consent, to put pressure on him, is theft, notwithstanding that the taking was intended to be only for a time (*Anon* 1880 Weir 3rd Ed. p. 233; *Anon* 1833 Ib. p. 245; *Queen* v. *U. si Noor Mohammed*, 1883 Ib. p. 246. So also it is theft to take property from an arbitrator, against his consent, to put pressure on him to give his award in favour of the taker *Queen* v. *Tiruvengada Chetti*, 1880 Ib. 235) or to take property without consent, for any other temporary purpose (*Queen* v. *Krishna Aiyan*, 1882 Ib. p. 244). It has also been held in Bombay that a charge of theft will lie even where there is no intention to assume entire dominion over the property taken, or to retain it permanently. So where the accused seized a boat belonging to the complainant, not with the intent of appropriating it, but to prevent the owner from plying it for hire, it was considered to be theft (*Queen Empress* v. *Nagappa*, 1890, I. L. R., 15 B, 344). The

accused here had no right to seize the boat; his seizure was gain by unlawful means, of property, to which he was not legally entitled, though his possession was intended to be temporary. The Calcutta Court held in *Queen* v. *Madaree Chowkidar*, 1865, 3 W. R., p. 2 that a landlord, taking his tenant's property, without his consent and distributing it amongst her creditors in satisfaction of their debts was guilty of theft. Here the loss to the tenant was indeed permanent, but it was laid down that a person acts illegally when he takes the law into his own hands and seizes the property of a debtor for the creditors, instead of directing them to sue for the debt. *Queen* v. *Preonath Banerjee* 1866, 5 W. R., 68 shows that it is equally theft for the creditor himself to adopt this method of satisfying his claim; see also *Queen* v. *Tarinee Prasaud Banerjee* 1872 18, W. R., 8. These cases are distinguishable from *Prosunno Kumar Patro* v. *Udoy Sant*, inasmuch as the intent in them was to deprive the owner permanently of his property, but the ground of the decision in them is not in harmony with the case last mentioned. In the more recent cases, the Court has held an intention to acquire permanently the property taken, to be a necessary ingredient in the offence of theft. So an illegal seizure and impounding of cattle, no profit accruing to the taker, has been held not to amount to "wrongful loss," within the section, to the owners of the cattle (*Aradhun Mundul* v. *Myan Khan* 1875, 24 W. R., 7) nor is it "wrongful loss" to the owner to be temporarily deprived of a khatta book taken with the object of producing it in court (*Queen* v. *Shoshee Bhoosun Roy* 1881. 14 Shome 14), or of a boat taken with the object of escaping in it, and abandoned thereafter (*Adu Shikdar* v. *Queen-Empress* 1885, I. L. R., 11 C, 635 & 644). The taking of cattle and impounding them in *Paryag Rai* v. *Arju Mian* 1895, I. L. R., 22 C, 139, was temporary, but as the object of the accused was to share with the pound-keeper, fees to be paid for their release, it was held to be a case of theft. This case is the same as Illustration (*l*) and open to the same remark that it regards the gain or loss of the property to refer not to the article itself taken, but to some other property. It differs from *Prosanno Kumar* v. *Udoy Sant*, inasmuch as the taking was with intent to gain some property (though other than the article taken) to which the accused was not legally entitled; but it is in conflict with *Aradhun Mundul* v. *Myan* where the intent was to cause payment of

except in case of the obsequies of father &c. Even after *Upanayanam*, a bachelor has pollution only in case he performs the obsequies of his father &c. Therefore the liability to pollution among the twice-born is unrestricted after the performance of *Samavartana* (a ceremony performed before marriage on completion of the course of holy studies). But women and Sudras are liable to pollution only after marriage, as marriage in their case takes the place of *Upanayanam*.

Now as to pollution consequent on birth:—The death of the fœtus of a pregnant woman within four months is called *srava*. In that case, pollution and untouchability last 3 days if the abortion is within 3 months, and 4 days if in the 4th month. In case of *sravam* for father and other *sapindas* purification is by bathing. (2) The death of the fœtus in the 5th and 6th months of the pregnant woman is called *Puta*. In this case pollution entailing unfitness for being touched is for five and six days respectively according to the number of the months; To the father and other *sapindas* pollution from birth is for 3 days but there is no death-pollution. All this, said till now, is common to all castes as based solely upon considerations of age. (3) In cases of delivery of a pregnant woman after the beginning of the seventh month, ten days birth-pollution for all *sapindas* including parents for Brahmins, twelve days pollution for Kshatriyas, fifteen days for Vaisyas, a month for Sudras, half a month for good-sudras; there is no death-pollution. The pollution for the step-mother is always as for the father. (4) In birth-pollution, the pregnant woman becomes unfit for touch for ten days. The father and step-mother, are unfit for touch before bath, can only be touched after bath, but in all cases the *sapindas* are only unfit for performance of *Karma* (rites). Even there the father can perform *Jātakarma* and make gifts before the separation of the naval cord. Thus on the 1st, 6th and 10th days the word of the father authorizes the performance of *Jamnadakhya* pujah.

From the common ancestor downwards within seven degrees are *sapindas*, seven from that *sodakas*, seven more from that are *sagotras*; three days' pollution for *sodakas*; for *sagotras* bath only (5) pregnant woman is unfit for *karma* for 20 days in case of the birth of a male and one month in the case of the birth of a female child after the 10 days after delivery (6).

So much for birth pollution: next death-pollution. Here those who have it, are rendered unfit both for being touched and for *karma*. If the child is born dead, all *sapindas* have ten days birth-pollution but no death-pollution. (7) If the child die before the severance of the naval cord, ten days' pollution for the mother: for the *sapindas* including the father, three days' birth-pollution: but there is no death-pollution. (8) In case of the death of the child after severance of the naval cord all the *sapindas* have 10 days' pollution but there is no death-pollution. (9) If the child die after 10 days but before the naming ceremony, the *sapindas* are purified by mere bath. Parents have 3 days' pollution if the male child dies; If the female child dies, one day's pollution. Before it is named, only burial: no daily libations of water &c., decoration of the corpse is allowed in all cases; (10) after it is named and within a year, burial or burning of the corpse in the alternative (11). In the case of the son's death after it is named and, before cutting teeth and, if buried, 1 day pollution for *sapindas*; if the corpse is burnt three days' pollution for parents in both cases. purification is by bath. In case of daughter's death, *sapindas* up to three degrees are purified by bath in both cases (12) In case of son's [illegible] (after birth) a day's death after cutting teeth and within a year [illegible] burning, 3 days pollution for *sapindas* in case of burial or of [illegible] pollution for father and mother. In case of daughter's death *sapindas* up to three degrees are purified by bath in both cases. 3 days' pollution for father and mother. (13) In the case of the death of the son whose tonsure has been performed in the beginning of his first year, *sapindas* including the father must observe 3 days' pollution. Corpse must be burned. (14) In the case of the son after his third year and before *Upanayanam* whether after tonsure performed or not, *sapindas* including the father must observe pollution for 3 days, burning imperative, libations of water in silence. If tonsure has been performed, offering of rice-balls in silence on the ground is prescribed. (15) In case of daughter's death after her third year but before betrothal (gift by word of mouth) one days' pollution for *sapindas* up to three degrees, 3 day's pollution for father and mother: burning, libations of water &c., in silence. (16) In case of daughter's death after betrothal and before marriage, the *sapindas* including father up to seven degrees in the father's and the husband's lines have 3 day's pollution; burning,

libations of water &c,, in silence. (17) In case of the death of a male after *Upanayanam* all *sapindas* &c., if *Brahmins*, have 10 days' pollution, 12 days' for *Kshatriyas*, 15 days for *Vaisyas*, a month for *Sudras* and half a month for good-sudras, 3 days' for *Sodakas*, all *gotrajas* purified by bath. (18) In case of the death of a married woman in her father's home, 3 days' pollution for the father, mother, and brother of full blood: 1 day for the paternal uncle and others. (19) If a married daughter is confined in her father's house, 3 days for the father and mother, 1 day for the brother of full blood, and half a day for the paternal uncle and others. Some hold this view. (20) In case of confinement in the husband's house, there is no pollution for the father and others. (21) If a married daughter dies in the father's house, 3 days for the father and mother. (22) In case of father's or mother's death, 3 days if within 10 days for the married daughter. After 10 days, at other times and at the end of the year, one and a half days. Here the pollution after proper time is only when it is heard from a Brahmin, not otherwise. (23) When either the sister or the brother dies in the house of the other, the other has 3 day's pollution. In case of their death in any other house, the other has pollution for one and a half days for her sister's death and *vice versa*. (24) For maternal uncle's death the sister's son or daughter has pollution for one and a half days. If they have received benefits from the maternal uncle, 3 days. (25) For maternal uncle's wife's death, her husband's sister's children have pollution for one and a half days. (26) If the sister's son dies after *Upanayanam*, the maternal uncle and his sister have 3 days' pollution. If he died before *Upanayanam*, the maternal uncle and his sister have pollution for one and a half days (27) In case of maternal grandfather's death, 3 days' pollution for the daughter's child. (28) If the daughter's son dies before *Upanayanam* the maternal grandfather and maternal grandmother have pollution for one and a half days; some say that they will have 3 days' pollution if he died after *Upanayanam*. (29) If the maternal grandmother dies, the daughter's children have pollution for one and a half days. (30) If the father-in-law or mother-in-law dies, the son-in-law if present at the death, has 3 days' pollution. If not present, one and a half days. If in a different village, one day. (31) In case of son-in-law's death the father-in-law and the mother-in-law are purified by bath. Some say they have pollution for a day. (32) If wife's

brother dies, the sister's husband has a days' pollution. If wife's brother's son dies, bath only. (33) If the father's sister dies, one and a half days for her brother's children. (34) If mother's sister dies, one and a half days for the sister's children.

One's *atmabandhavas* are one's father's sister's, mother's sister's and maternal uncle's, sons; one's *pitrubandhavas* are one's father's father's sister's sons, father's mother's sister's sons, father's maternal uncle's sons; one's *matrubandhavas* are one's mother's mother's sister's sons, mother's father's sister's sons, mother's maternal uncle's sons. These are the three classes of *bandhus*. When any (member) of these classes dies, there is pollution for one and a half days. In the case of the death of daughter of father's sister &c., after marriage, there is one days' pollution.

In the case of the death of a *dattaka*, the natural and the adoptive fathers have three days' pollution; *sapindas* have one day's. (36) When the natural or the adoptive father dies, the *dattaka* has 3 days' pollution. In the case of the birth or death of a son or grandson of an adopted son the *sapindas* have a day's pollution. (38) If a *sapinda* is adopted and he dies, the *sapindas* have ten days' pollution certainly.

(39) When the *acharya* dies, disciples have 3 days' pollution; in case of his son's or wife's death, one day's pollution; he who performs *Upanayanam* and teaches the Vedas is called *acharya* He who teaches any portion of the Vedas is called *upadhyaya*. In case of his death the disciple has a day's pollution. (40) If the disciple dies after *Upanayana*, the *guru* has 3 days' pollution; when the *Upanayana* has been performed by another, only a day. (41) In the case of the death of a co-disciple or of the *anuchanas* and *srotriyas* of the same village a day's pollution; one who has studied the Vedas with all *angas* is called an *anuchana*; one who has studied the Vedas alone is called a *srotriya*. It is logically settled that the term *adhyayana* means that study which results in the understanding of the meaning. (42) The owner of a house in which a *srotriya* dies if a friend, &c., though not a *sapinda*, has a day's pollution. (43) If an ascetic, *sanyasin*, or a eunuch dies or if one dies in battle the *sapindas* are purified by bath merely. (44).

Then *Athikrantasoucham* is, pollution prescribed where the event subjecting persons to it, is heard of after the lapse of the period

of pollution originally prescribed. There is no *Athikrantasoucham* in case of births. Even there, the father must bathe. Even in respect of death-pollutions there is no *Athikrantasoucham* in the case of the 3 days' pollutions prescribed for the death of persons before *Upanayana*, maternal uncles, &c., and it only applies to cases of death pollutions for ten days, &c. (45).

If birth or death is known within 10 days, the sons and all others are purified after the rest of the time. The rites too must be performed within the rest of the time. The rites with bones, leaves and arrows must also be completed within the rest of the time. (46) If the death of a *Samanodaka* is known within the first three days, the *Samanodakas* are purified after the rest of the time; if known after the three days and within ten days, no pollution, but bath only (is prescribed). This very rule must also be understood to apply to the case of 3 days' pollution consequent on the death of maternal uncle and others. (47).

In the case of the death of father and mother heard of in distant countries or within one year after death, the son must observe the entire pollution of 10 days, &c. (48) When the death of the husband or of the wife is heard of by the wife or the husband in distant countries or within the end of the year, the wife or the husband must observe the full pollution of 10 days, &c. (49) When any of the co-wives dies the survivors without consideration of place or time must observe the full pollution of 10 days. (50) In the case of step-mother's death, three days' pollution even in distant countries and even after a year. (51) If the *aurasa* son dies three day's pollution for the father and mother even after a year (is prescribed). (52) If the death of *gnati* in the same country is known after 10 days and within 3 months, 3 days' pollution; within six months, one and a half days; within nine months, 1 day; after that, bath only. So says *Vridhavasishta*. Within three fortnights, 3 days; within six months one and a half days; within a year, one day, after that, bath only. So says *Devala* (quoted) in *Madhava*. Here these conflicting rules should be differentiated according to there being hardship or no hardship. (53) If the death of a *gnati* is known in a different country after 10 days and within three fortnights (45 days), 3 day's pollution. If after that and within six months, a day and night. If after that and within a year if known by day, till sunset; if by night, till next morning.

After a year, one is purified by bath. All these rules relating to impurity in case of hearing a death after the prescribed period, apply to all castes. Here some say that where the death of a *gnati* in another country is known, the person affected is purified by bath. It must be known that this view is *induced* by ignorance of *Vishnu Smruti* quoted in *Madhava*. A place removed from another by 20 *yojanas* is a different country for a Brahmin. For a *Kshatriya*, a different country is a place removed by 24 *yojanas*. To a *Vaisya* and a good *Sudra* a different country is a place removed 30 *yojanas* and to a bad *Sudra* a place removed by 60 *yojanas*. Other theories must be understood consistently with that here stated. (54) Here *mind* the following rule. Those *Athikrantasouchas* which are prescribed in respect of births and deaths in the same *gotra* are to be observed alike by the husband and wife, but those prescribed in respect of different gotras such as maternal uncle, sister, &c., are to observed by the husband or the wife or both according as the relationship obtaining between the husband and the wife separately to the deceased or newly born.

(55) In the case of the death of an *ahitagni* (one who keeps sacrificial fire), the pollution must be observed by the sons and others from the day of the burning of the corpse with *mantrams*. (56) If an *ahitagni* dies while in a different country, his sons and others have no pollution before the burning of the corpse with *mantrams*. There is no prohibition to perform daily supplications, &c. (57) In the case of one not an *ahitagni*, the sons and others must observe pollution from the date of death. (58) In the case of death or birth during night, the night must be divided into three equal portions and if the birth or death be within the first two portions the pollution must be *begun* from the previous day: if in the third, from the next day. Another view is that before sunrise is the previous day, after that, succeeding day, The three theories obtain in different countries. In the Maharashtra the first theory alone is in practice. (59) This is the law about pollution in Triambaka's book.

Solution in cases of conflicting and simultaneous pollutions.

When within 10 days' death pollution, another death pollution of ten days or less intervenes, then purification from both (results) after the rest of the first pollution shall have been

observed. (60) If within 10 days' birth pollution another birth pollution of ten days or less intervenes, then purification from both, results after the rest of the first of pollutions shall have been observed. If within a birth pollution a death pollution of ten days or less intervenes the second will not be over with the first. In that case any balance of the first will be discharged when the death-polution is fully observed. (62) If within 3 days' pollution for birth or death a ten days' pollution for birth or death intervenes, the second will not merge in the first. (63) If in a death pollution a birth pollution of equal or shorter duration intervenes, purification results when the the first is observed. (64) Purification from a birth pollution even of longer duration, so says the author of *Sudhiviveḳha* (65) A pollution intervening in the course of another, if heard after that other, must be subsequently observed. If in the last night of a ten days' pollution a ten days' birth pollution intervenes, pollution must be observed for 2 days more; that night and the next day. (66) If in the last quarter of the last night of a ten days' pollution another ten-days' pollution intervenes then pollution must be observed for 3 days more. (67) If in the last night of a pollution of 3 days' or less another pollution of 3 days or less intervenes, there is no extension of 2 days, &c. (68) If within the 2 or 3 days extension another pollution intervenes, the longer will not merge in the previous. If of equal or shorter duration, then it will merge in the former. (69) With the pollution for *Sapinda's* death, the pollution for the death of mother, father or husband will not end. (70) If in the pollution for mother's death, the pollution for father's death intervenes, purification results at the end of the former. (71) Some say that purification results after the full term of pollution for father's death. With them the word remainder by some figure of speech means full. If during pollution for father's death the mother dies, the full term of the former pollution must be completed and then pollution must be observed for one and a half days more. (72) This will be, if it is before the 10th night. If the mother dies in the last quarter of the 10th night, pollution for 2 days or 3 days: not for one and a half days. (73) If the mother follows suttee, there is no extension by one and a half days purification at the end of the former pollution. (74) This does not affect the son who burns the father's corpse and other sons. The repetition of *Prataputra* is to secure conformity with other texts. (75).

If in a birth pollution a death pollution intervenes, there is no prohibition against offering rice balls. If in a death pollution a birth pollution intervenes, the performance of *jatakarma*, &c., then and there, or after end of pollution, is optional. (76) The 11th day *sradha* for the father should be performed even during the Pakshini extension on account of mother's death. (77) If a corpse is touched by day, purification results at the sight of the stars: if by night at the sight of the sun. By eating the meals or living in their house, pollution of the person doing so continues as long as theirs. (78) Pollution by touch produces not unfitness for *karma*, but unfitness for touch only. (79) People living in his house or things in his house are not affected by pollution. (80) In carrying a corpse of the same caste, in eating his meals and in living in his house out of friendship, 10 days' pollution. In living in his house without eating his meals, 3 days' pollution. (81) In carrying the corpse alone without living in his house or eating his meals one day's pollution. (82) For carrying a corpse of the same caste and burning it for wages received, pollution for 10 days or more according to that caste. (83) For carrying a corpse of a different caste and for burning it, pollution according to the caste of the deceased—for carrying a corpse of a different caste and for burning it both for wages, pollution twice as long as that of the caste of the deceased. For carrying the corpse of the *Sodaka* 10 days' pollution. (85) For decorating the corpse of one not a *Sapinda* out of ignorance, fasting, if unable, bath. If done intentionally, quarter *krichram*. (86) Immeasurable benefit to Brahmin who, for charity carries a friendless corpse of the same caste, performs the funeral rites or burns it. He is purified by bath, *pranayama* and touch of fire. (87) Even in carrying the dead body, &c., of the same caste out of charity if the person so doing is related as maternal uncle, &c., he must observe 3 days' pollution. (88) There is no harm in a *Sapinda* following a corpse, also not even in one not a *Sapinda* if the rites are performed for the friendless deceased for mere charity. (89) For following a corpse of the same or higher caste, one must bathe, touch fire, drink ghee, bathe again, and perform *pranayama*. (90) In following a corpse of inferior caste, a day's pollution if the deceased was a *Kshatriya*, one and a half days if *Vaisya*, 3 days if *Sudra*; bath, &c., as previously stated. (91).

Bachelors have no pollution for *Sapinda's* death; they are not permitted to carry the corpses of others, burn or perform funeral rites (92) If he does this, his *Upanayana* must be performed again; he must also perform *Krichra Prayaschittam.* (93) There is no harm in bachelor's performing the funeral rites of his father, mother, *upadhyaya* and maternal grandmother. For doing that he will be polluted, *i.e.*, rendered unfit for touch for 10 days. (94) All these 10 days he is at liberty to perform daily supplication, sacrifice, &c. (95) *Madhava* says that he is unfit to be touched for a day. (96) Even during pollution for father's death, &c., a bachelor should not eat the meals of polluted persons. If he eats, his *Upanayanam*, (the investiture with the sacred thread) must be performed again. A bachelor not performing the funeral rites of his father, &c., is not affected by pollution even by the death of his father, &c., (98) After *vrita* before marriage he must observe 3 days' pollution for those who died previously. (99) *Hemadri* says that one who had performed *jivat-sradha* need not observe any pollution at all. (100) No pollution need be by ascetic, *sanyasin* or outcaste. Mothers too should not observe pollution for their death. (101) For performing the funeral rites of a person of higher or same caste, pollution prescribed for the caste of the person so performing should be observed by him and he must also perform three *krichras.* (102) But if he performs the funeral rites of one of inferior caste, he must observe the pollution prescribed for the caste of the deceased and perform 6 *krichras.* (103).

For the burning of the bones of an *ahitagni*, or for the burning of his likeness, all *Sapindas* must observe 10 days' pollution, &c. (104) In the case of the burning of the bones of one not an *ahitagni*, of the burning of leaves and arrows, his wife and sons if they had not observed pollution for his death previously must observe the full pollution for 10 days, &c. (105) If they had observed pollution previously they must at the time of the burning observe 3 days' pollution. The same rule for the husband in case of the *samskara* of his wife. The same rule between co-wives. (106) In the case of other, *Sapindas* who had not previously observed pollution, 3 days' pollution at the time of the *samskara* of one not *ahitagni.* If they had observed pollution, they must only bathe at the time of *samskara.* (107) This 3 days' pollution, &c., must be observed

when the *samskara* is done more than 10 days after death, as it has already been said that where it is done within 10 days, the rest of the pollution need be observed.

The menses of a woman recurs after 20 days. If she sees traces of menstruation within 17 days again, she must only bathe; if on the 18th day, she must observe pollution for a day; if on the 19th, 2 days, from the 20th day 3 days. (109) But a woman whose menses generally recur within less than 20 days, must only bathe if she sees traces of menstruation on within 10 days. If on the 11th, must observe pollution for a day, if on the 12th, 2 days, if on the 13th, or after, 3 days. (110) Thus the 109th section in Triambaka's Asouchanirnaya. The authorities on which these conclusions are based may be gathered from Mitakshara and other books. They have not been quoted here, as that would swell the book and as those authorities are above the comprehension of the young.

NOTES OF INDIAN CASES.

Chhotay Lal v. Puran Mull, I. L. R., 23 C, 39. The real point for consideration does not appear to have been brought out in the judgments of the learned Judges. There is no doubt that a court to which a decree is sent for execution has the same power as the court which passed it. Such a court can hold the decree barred as much as the court which passed the decree. Section 228 makes it clear. It is equally clear that if objection to the transfer of the decree for execution be taken by the judgment-debtor on the ground that execution is barred and the court overrules the objection and transfers the decree, the court to which it is transferred is barred by the rule of *res judicata* from considering the question of limitation over again. *Husein Ahmad Kaka.* v. *Mahamad Sahid* I. L. R., 15, B, 28. But the difficulty arises when on application the decree is transferred, no question of limitation having been raised. Can the court to which the decree is transferred entertain the objection? The Judicial Committee has held where an order in execution is passed upon notice, an objection to the execution which might have been raised at that time could not be raised subsequently. If therefore the transfer under S. 223 is made on notice, it follows that the objection of limitation cannot be raised before the court to which the decree has been transferred. But if there was no notice, and S. 223 does not prescribe any, the order of transfer cannot amount to an implied adjudication on the question of limitation precluding a fresh agitation of it.

Dukhi Mullah v. Halway, I. L. R. 23 C, 55. The court very properly observed that marginal notes are not part of an enactment. They are prepared generally by the Secretary of the Legislative Department or by the member in charge, but are never considered in Council. It would be absurd to give them any weight in determining the construction of doubtful sections.

Mohima Chunder Bhuttacharjee v. Nobin Chunder Roy, I. L R., 23 C, 49. The decision in this case appears to us to be questionable. It seems to us as pointed out by *Muthusamy Aiyar*, J. in *Arumuga* v. *Chokkalingam* I. L. R., 15 M, 331 that article 136 applies to suits brought upon claims not derived from purchasers at a court-sale. See also *Pullayya* v. *Ramayya* I. L. R., 18 M, 144. If the auction purchaser himself would be barred, time running from the date of sale, it seems anamalous to hold that the private purchaser from him is entitled to come under article 136, and claim calculation of the time from the date of confirmation of the sale.

Surb Narain Singh v. Birj Mohun Thakur I. L. R., 23 C, 80. We are not convinced of the correctness of the distinction drawn in this case between cases where the dispute is as to the right to collect the whole rent and those in which the right to collect a share of the rent is contested. It is allowed that a dispute regarding the right to collect rent is one relating to tangible immoveable property within the meaning of S. 145. If both the contending parties are agreed that the dispute is as regards a particular share, the case seems to fall equally within the section. Of course if A claims a $\frac{1}{4}$th share of rent and B claims another $\frac{1}{4}$th without reference to A's, although each party may deny the other's claim, the dispute is not as regards the same property and therefore does not fall within S. 145. The cases cited do not seem to be authority for the position of the learned Judges. The case of *Ramrunginee Dasee.* v *Gooroodass Roy* 18 W. R. Cr. 36 proceeds on the view that a dispute as regards rent does not fall within the section. The case of *Beni Naraín* v. *Achraj Nath* I. L. R., 5, A, 607 does not show that the dispute was as regards the same share. There is only this in support of the decision that the scope of S. 145 should be restricted as much as possible consistently with the language of the section. But we are not sure that there is any basis for the distinction drawn by the Judges.

Jagarnath Singh v. Budhan I. L. R., 23 C, 115. There can be no doubt that an order dismissing an appeal for default is no decree. The Code allows an application to set aside the order and an appeal in case the application is not allowed. This procedure seems to suggest that the

legislature precluded the party from appealing directly from the dismissal for default. If there was default, the Court was bound to dismiss the appeal, however the default was occasioned and an appeal can avail the party nothing unless he shows there was no default at all. We do not, however, see the force of saying that the order is not an adjudication upon a right claimed. Suppose an appeal is dismissed on the ground that it is barred by limitation, is there no appeal from the dismissal. There is, because the order of dismissal is a decree. If that is an adjudication upon the right claimed why should not the dismissal for default be an adjudication likewise.

Queen-Empress v. Croft, I. L. R. 23 C, 174. It does not appear to have been possible for the Court to come to any other conclusion than what they did, having regard to the language of S. 403 of the Criminal Procedure Code. The learned Judges hold that if the same facts amount to offences under different enactments, a trial for an offence under one of the enactments does not preclude a trial under the others. Section 403 bars a second trial in respect of the same offence or in respect of offences referred to in Ss. 236 and 237 of the Criminal Procedure Code. The present case is evidently not one falling within those sections. The Court therefore, had no alternative but to hold a second trial valid.

Pallakdhari Rai v. Manners, I. L. R., 23 C, 179. In reference to the transferability of an occupancy holding by custom, the Judges refer to the Privy Council case of *Jago Bhandu Ghose* v. *Manick Chund* 7 M. I. A., 263, which deals purely with mercantile usages and the conditions of the validity of such customs. That case, therefore, does not seem to have any application to a custom relating to the transferability of an occupancy holding.

We are glad, however, that the learned Judges unlike their brethren of the Madras High Court, set aside the decree of the lower Appellate Court where the judgment was passed partly upon evidence which was irrelevant. The mere fact that there was also relevant evidence referred to, does not preclude the interference of the High Court where it is impossible to say that the conclusion was arrived at upon a proper consideration of that evidence alone. The language of S. 584 does certainly require to be better understood than it has been.

Ananda Mohan Roy v. Hara Sundari, I. L. R., 23 C, 196. The payment of poundage fees by the purchaser in Court sale though he may also happen to be the decree-holder, cannot amount to an application to take a step in aid of execution, because it does not relate to execution at all. As observed by the Court in this case "No application as regards

the purchase money either to draw it out of court or to set it off against the decree when the decree-holder is himself the purchaser can be properly said to be an application to the court to take a step in aid of execution of the decree." The Judges refer to other cases of payment of money by the decree-holder prior to sale for the purpose of facilitating it and there is some conflict of authority on the matter. Payment of money by itself is not an application to take a step in aid of execution, but it may be accompanied by an oral application to proceed with the attachment or to do something else with reference to the sale and such an application would certainly fall within article 179.

Subjoodas *v.* **Balmakund Das,** I. L. R., 23 C, 212. We have more than once expressed our disagreement with the Calcutta view, as regards the liability of the surety under S. 546 to be proceeded against in execution. We think the Calcutta Judges do not give due effect to the language of S. 583 which directs the execution of the decree in appeal to be made in accordance with the rules prescribed for the execution of decrees in suits. Section 253 is thereby extended to appeals and the surety in appeal should be dealt with in execution in the same way as the surety in the suit. The amendments made by the legislature as regards Ss. 549 and 610 appear to us to furnish a strong argument in favour of the Bombay and Madras view.

Gopal sah *v.* **Janki Koer,** I. L. R., 23 C. 217. Article 179 speaks of an application in accordance with law. Where the application for execution does not comply strictly with the requirements of S. 235 of the Civil Procedure Code, is it in accordance with law? We think the expression "in accordance with law" is not sufficiently clear. The cases upon the subject are collected in *Mitra's Limitation* pages 808 and 809 and they reveal a chaotic condition of things. We are disposed to agree with the Madras view that a substantial compliance with the Code of Civil Procedure will satisfy the provision.

Queen Empress *v.* **Jahandi,** I. L. R., 23 C. 249. **Queen Empress** *v.* **Karamdi,** I. L. R., 23 C. 250. The District Magistrate and the Sessions Judge have the power to refer cases to the High Court for revision where they are dissatisfied with the order of a subordinate magistrate. Section 438, Criminal Procedure Code does not contemplate the District Magistrate making a reference where he is dissatisfied with the order of a Sessions Judge. The Madras High Court has taken the same view.

Queen Empress *v.* **Imam Ali Khan** I. L. R., 23 C. 252. The High Courts in India do well to insist upon the provision of the Criminal Procedure Code being strictly complied with by the subordinate tribunals.

Section 537 cannot cure the omission to call upon the accused to enter upon his defence. It is no doubt straining the word *mis-direction* to enable the High Court to interfere in appeal but the direction to a jury to give a verdict without calling upon the defendant to enter upon his defence may not improperly be called *mis-direction.* Anyhow it is a case for interference.

Boloram Dey *v.* **Ram Chundra Dey,** I. L. R., 23 C. 279. A preliminary decree for partition falls within the definition of a decree and is appealable as such. This view has been accepted also by the Madras High Court. The final decree being passed after measurement the High Court holds that no appeal can lie from the final decree objecting to the propriety of the preliminary decree. If the right of appeal given by law was not exercised, the matter is concluded and cannot be agitated on an appeal from the final decree.

Radha Pershad Singh Bahadur *v.* **Ramkhelawan Singh,** I. L. R., 23 C. 302. Has a manager of a Hindu family who is not the father, power to sell family property for a debt binding upon the family, under all circumstances. If he has, it would follow that in execution of a decree against the manager for a debt binding upon all, family property may be sold and the interests of the other members may pass likewise. The Privy Council has only held that upon a sale of family property if the whole interest was purported to be sold and purchased, the other members who were no parties to the decree could not question the propriety of the sale. But it has been held in *Minakshi Nayudu* v. *Immudi Kanaka Ramaya,* I. L. R., 12 M. 142 that even before the sale the executing court may determine the liability of the shares of the other members and direct the whole interest to be sold. That was the case of a father and son, but the principle is the same, the difference being only as regards the nature of the debt. If that view should be right, the court may in the case of a decree against a manager determine the liability of the shares of the other members in execution. But the question we started with cannot be answered in the way in which it is assumed it should be. The manager cannot sell merely because there was a family debt, or even then, because there was a decree. There must be further necessity, or the purchaser must have made a *bona fide* enquiry, to validate the sale. It may, however, be said in the case of a court-sale the property having been siezed and none of the members having chosen to interfere, there would be sufficient proof of the necessity for the exercise of his undoubted power of sale and therefore, also sufficient justification for the court exercising that power of the manager and selling the interests of the other members as well. The whole argument, however, depends upon

the correctness of the application of the *ratio decidendi* of the Privy Council cases which stop short of the validation of sales which have already taken place to cases of the carrying out of sales in the face of objection by the other members.

SUMMARY OF RECENT CASES.

County Council—By-law—Reasonableness.

Strickland *v.* Hayes [1896, I, Q. B. D., 290].

This case might well serve as a guide to our Municipal Councils which are invested with large powers to make by-laws in respect of various matters affecting the liberties of the subject, and we hope will induce them to use great care in the enactment of by-laws under the Municipal Acts. Under S. 16 of the local Government Act, 1888, a county council made a by-law which ran as follows:—"No person shall in any street or public place, or on land adjacent thereto, sing or recite any profane or obscene song or ballad, or use any profane or obscene language." The appellant was accused of using obscene language on a foot-path in a field in the presence of a large number of persons, and was convicted by the Justices.

Held, by the Court of Appeal in quashing the conviction of the Justices, that the by-law was invalid as being unreasonable, firstly, because the words "on any land adjacent thereto" would include private places and were consequently too wide and went far beyond what was necessary for the good Government of the county; and, secondly, because, even if these words were struck out, the rest of the by-law was still unreasonable as it did not contain anything which required that the Act should be committed so as to cause annoyance to other people when alone it would amount to an offence. Unless the Municipal Act expressly provides for it, a by-law cannot be made so as to create a new criminal offence.

License—Duty of Magistrates.

Phillips *v.* Evans, [1896, I, Q.B.D., 305].

The appellant, an officer of Inland Revenue, preferred an information against the respondent for keeping a dog without a license. The respondent kept a dog without either an excise license or a certificate of exemption under 41 and 42 Vic. c. 15, s. 22. It was proved that the respondent had applied for an exemption certificate in due form, but

that the Commissioners had refused to grant him such a certificate as in their judgment he was not entitled to it. The Justices dismissed the information on the ground that the respondent was a person who, in their opinion, was entitled to a certificate under the provisions of S. 22, and that even though the alleged offence be considered as proved, it was under S. 16 of the Summary Jurisdiction Act, 1879, of so trifling a nature as to render it inexpedient to inflict any punishment on the accused.

Held, by the Court of Appeal that the Justices had no jurisdiction to review the discretion of the Commissioners in granting or witholding a license or an exemption certificate; and

That the offence of refusing to take out a dog license was not an offence of a trifling nature to which S. 16 of the Summary Jurisdiction Act, 1879, applied.

Independent contractor—Negligence—Employer's liability.

Hardaker *v.* Idle District Council, [1896, I, Q.B.D., 335 C.A.]

The question how far a person is civilly liable for an act of negligence not committed by himself has been trying the ingenuity of the Courts for a long time, and, although at the present moment the current of decisions, have, in spite of serious conflict among some of them, narrowed the field of discussion and laid down certain definite principles upon which the liability is to be based, still the application of those principles to complicated cases must ever remain a difficult task in which it will not always be easy for Courts to avoid mistakes. A lengthy article on the subject could alone give a clear idea of these principles; but we shall content ourselves with the statement of that one of these principles of which the present case is an illustration. Stated in the abstract, that a person is not generally responsible for the negligence of an independent contractor to whom he might have entrusted the performance of a particular task, but where there is a duty cast on him to perform that task he cannot relieve himself of the responsibility attaching to the duty by delegating it to a contractor; he is responsible for the neglectful performance of that duty by the contractor as distinguished from the collateral negligence of the contractor or his servants in the course of its performance. It will be going beyond the bounds of a summary to expand and explain this principle. The facts of the present case in which this principle was applied are as follows: The Idle District Council being about to construct a sewer under their statutory powers entrusted

the task to one Thornton with whom they entered into a contract for the construction of the sewer in accordance with a specification bill of qualities and drawings annexed thereto. Under the contract, the contractor was bound to take special care that no breakages occur to any gas or water pipes that may be found in the line of the sewers and to indemnify the Council for any damage resulting therefrom. After the excavation had been made for the sewer, the contractor negligently and insecurely packed the soil around a gas pipe in use, whereby the gas pipe was broken and the gas escaped and found its way into the plaintiff's house, where it exploded wrecking his furniture and seriously injuring his wife. The plaintiff sued both the Council and Thornton for damages for the injury. The Council pleaded that they were not liable for the negligence of their contractor. Held by the Court of Appeal (reversing the decision of *Wright J*).

1. That there was a duty cast upon the District Council, when they undertook the construction of the sewer, to see that no damage was done to any gas-pipes that may be found in the line of the sewer.

2. That the Council cannot relieve themselves of this responsibility by delegating it to a contractor.

3. That in the absence of proof on the part of the Council that their contractor had taken proper precautions in the matter, they were liable for the non-performance of their duty whether that was due to the negligent packing of the soil round the gas-pipe or otherwise.

4. And that the injury caused to the plaintiff was the natural and probable consequence of the negligence of the contractor for which the Council were also liable.

Company.—Misrepresentation in prospectus—Continued fraud.

Andrews *v.* Mockford and another, [1896 I Q. B. D., 372, C. A.]

The House of Lords decided in *Peek* v. *Gurney*, L. R., 6 H. L. 377, that when shares are purchased upon the market, and not by allotment from a Company, fradulent misrepresentations in the prospectus of the Company cannot be relied on by a purchaser, because, the prospectus would have therefore performed its function which, *prima facie*, is only to obtain purchasers for the Company, of shares by allotment, and that consequently a purchaser upon the market cannot have a cause of action against the Company upon the prospectus. But this presumption is rebuttable by evidence which will show that the prospectus was intended to operate longer than the allotment,

The defendants promoted a Company to purchase some property held by them in Transvaal and they issued a prospectus of which they sent a copy to the plaintiff. The prospectus contained a report of the prosperous state of the gold reefs on the property, which report was fradulent and false to the knowledge of the defendants: the proposed company being only a sham to induce the public to purchase shares therein. The plaintiff did not immediately purchase any shares, but kept noting from time to time the price of the shares. The prospectus produced but a scanty subscription for shares and thereupon the defendants fradulently caused to be published in the *Financial News* a false telegram that a large body of payable ore had been discovered on the property, in order to stimulate and bring about which the prospectus had failed to effect. The plaintiff relying on the truth of the telegram confirming the statement in the prospectus purchased shares in the company which immediately was wound up without having ever paid a dividend. The Jury found that the prospectus was intended not only to induce the plaintiffs, as one of the public, to buy shares from the company by allotment but also to induce him to buy shares in the market and that the telegram and the prospectus constituted one continued fraud. *Held*, by the Court of Appeal (confirming the decisions of the Lord Chief Justice that the defendants were liable and that the case of *Peek* v. *Gurney* was distinguishable.

Partnership—Powers of managing parties.

Tomlinson *v.* **Broadsmith** and Another, [1896. I. Q. B. D. 386 C. A.]

In the absence of anything to the contrary a managing partner of a business firm has an implied authority to employ a *Solicitor* to defend an action brought against the firm for the price of goods supplied to the firm in the ordinary course of business.

A Solicitor so employed has authority to enter an appearance in the name of each of the partners individully and is not guilty of negligence in not keeping the partners, other than the managing partner by whom he was employed, informed of the progress of action.

Duty of Vendor—Constructive notice.

In re, **White and Smiths' Contract** [1896 I. Ch. D. 637.] per Stirling J.

In a sale of real property it is *prima facie* the duty of the vendor to disclose all that is necessary to protect himself, and not the duty of

the purchaser to make inquiry before entering into a contract; this rule applies whether the sale be by public auction or private contract. *Reeve* v. *Berridge* 20 Q. B. D. 523.

The defendants' property held under a lease for ninety-eight years was sold by auction and purchased by the plaintiff. The particulars and conditions of the sale described the property as being held under the lease but contained no statement as to the nature of the covenants in the lease which were onerous, nor any notice on the part of the vendors that the lease might be inspected at the office of their solicitor or elsewhere. Upon the delivery of the abstract of title the plaintiff discovered that it contained onerous and unusual covenants of which he had no notice and claimed to rescind the contract. *Held* by Stirling J. that the purchaser was not affected with constructive notice of the covenants, that he had not had a fair opportunity of inspecting the lease and was therefore not bound to complete the contract.

Claim—Assignment of simple mortgage before due date.

Shib Lal v. Azmat Ullah.

The term "actionable claim" as used in S. 130 of Act No. IV of 1882, means a claim in respect of which a cause of action has already matured, and which, subject to procedure, may be enforced by suit.

Held, that the assignment for value of a simple mortgage before the due date of the mortgage is not a sale of an actionable claim within meaning of S. 135 of Act No. IV of 1882 *Rani* v. *Ajudhia Prasad* (I. L. R., 16 A. 315) referred to and explained.—*Allahabad Weekly Notes.*

Mortgage by tenant at fixed rates—Ejectment of mortgagor by Zamindar

Nakchedi Bhagat *v.* Nakchedi Misr.

The rule of law which prohibits a mortgagee or tenant from disputing his mortgagor's or landlord's title does not bar the mortgagee or tenant from showing that the title of his mortgagor or landlord under which he entered has determined.

Hence where a tenant at fixed rates, who, having mortaged his fixed rate holding by a usufructuary mortgage and put the mortgagee in possession, was ejected by the Zamindar, subsequently sued the mortgagee, who had remained in possession after his mortgagor's ejectment, for redemption of it, was held that the mortgagee could plead successfully, that the mortgage had determined by the ejectment of the mortgagor.

Execution of Decree—Auction Sale.

Yellappa bin Tukappa Bhusari v. Ramachandra bin Nilkanth Devasthale.

Where a person, a stranger to the proceedings, purchases property *bona fide* at an auction sale held in execution of a decree by a competent Court, his sale cannot be set aside on the ground that the decree had been satisfied out of Court when the sale was held.

Rewa Mahton v. *Ram Kishen*, L. R., 13 I. A., 106, and *Mathura Mohun* v. *Akhoy Kumar*, I. L. R., 15, C., 557, referred to and followed.

Ganga Pershad Sahu v. *Gopal Singh* I. L. R., 11 C. 136 and *Pat Dasi* v. *Sharupchand* Mala, I. L. R., 14. C., 376, referred to and distinguished.—*Printed Judgments of the B. H. C.*

Dismissal of appeal—Decree, Power of Lower Court to amend when appeal dismissed.

Bapu Valad Vana Patil v. Nilkanth.

The dismissal of an appeal under section 551 of the Civil Procedure Code leaves the decree of the lower Court untouched, neither continued nor varied, nor reversed, and it remains the decree of the lower Court, which can amend it in order to bring it into accordance with its judgment.—*Printed Judgments of the B. H. C.*

Judgment and decree passed according to the award—Resjudicata.

Vyan Katesh Chimaji Joshi v. Sakharam Daji Ganpule.

A judgment and decree of a Court passed under section 522 of the Civil Procedure Code (Act XIV of 1882) according to an award constitute, a *resjudicata.*—*Printed Judgments of the B. H. C.*

Ganesh Jagannath Dev v. Ramchandra Ganesh Dev.:—The plaintiffs applied under the probate and administration Act (V of 1881) for probate of the will of a deceased person. The application was rejected by the High Court in appeal on the ground that on the evidence before the Court due execution of the will was not proved. The plaintiffs thereupon filed the present suit as the persons beneficially entitled under the will for declaration that the property of the deceased belonged to them and for an injunction to restrain the defendant from obstructing them in the enjoyment of it. The defendant contended that the suit was barred as being *resjudicata.*

Held, that the order on appeal of the High Court did not debar the plaintiffs from filing the suit. Such a suit as the present can be maintained by a Hindu in cases in which, as in the present case, the Hindu Wills Act is not applicable without the necessity of proving the will under the probate and administration Act (V of 1881).

The refusal to grant probate does not conclusively show that the will propounded is not the genuine will of the testator.—*Printed judgments of the B. H. C.*

Family debt—Court sale.

Bhana Valad Jayaram v. Chindhu Valad Harchand:—

Where property was sold in execution of a decree against a brother as the manager of joint-family for a joint-family debt contracted by the father and his two adult sons.

Held, that in the absence of special circumstances the other members were bound by the sale.—*Printed Judgments of the B. H. C.*

Purshotamdas Manecklal *v.* Bai Mani.

In a suit of restitution of conjugal rights against the wife the defence was cruelty. The first Court held the defence not proved and allowed the claim. On appeal the District Judge reversed the decree on a plea which was not raised in the first Court and with respect to which no issue was raised in appeal, the plea being physical malformation of the wife.

Held, reversing the decree, that a plea by a wife that sexual intercourse with her is impossible owing to her incurable disease or physical malformation is not in itself a good defence to a suit by the husband for restitution of conjugal sexual intercourse. There are reciprocal duties and obligations of the husband and wife under the Hindu Law. It would be manifestly wrong to allow one of the parties to withdraw from the performance of duties and obligations binding on him on a ground which gives him no cause of complaint and of which the other party does not complain.—*Printed Judgments of the B. H. C.*

Kalen *v.* Halki.

Section 20 of Act No. XV of 1877 does not have the effect of extending indefinitely the period within which the usufructuary mortgage must be redeemed.

Where a Court has occasion to admit a previously unstamped document in evidence, upon payment of a penalty under S. 34 and the following sections of Act I of 1879, it is necessary that the original instrument should be before the court.—*Allahabad Weekly Notes.*

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following Legal publications;—

The Educational Review for May and June, 1896 (*in exchange.*)
Geen Bag for May 1896 (*in exchange.*)
Harvard Law Review for May and June, 1896 (*in exchange.*)
Allahabad Weekly Notes for May and June, 1896 (*in exchange.*)
The Chicago Law Journal for April 1896 (*in exchange.*)
The Albany Law Journal for May 1896 (*in exchange.*)
The Law Digest and Recorder for April and May, 1896 (*in echauge.*)
The Canadian Law Times for May 1896 (*in exchange.*)
The American Law Review from Jan. to April 1896 (*in exchange.*)

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An impertinent junior :—A young counsel who had to defend the relevancy of a pleading which had been drawn by his senior, replied (somewhat impertinently) to the Judge when asked what he could say in defense of it, "Oh my lord, I did not draw it." Yes, said the Judge, but you don't mean that that of itself shows it to be right.—*The Yale Law Journal.*

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Judges on Trial ;—In an interesting article on the Legal Profession in Scotland professor J. Dove Wilson describes a curious custom in the courts.

There is the custom of taking a judge on trial after he has received his letter of appointment from the crown. The judges gravely assemble to hear the letter read and stand to hear it, for is it not Her Gracious Majesty's message? Then their consent to take the crown-nominee on trial, for even a Sovereign may err when it comes to a question of knowing some body who knows scots law. They send the nominee off to the outer house with a Judge to hear a case. The nominee returns after hearing it with the Judge who has taken him in. This Judge gives his report of the case, and then the nominee is called upon to say how he would decide it. The Judges hear his opinion with the gravest courtesy. I have seen them proceed deliberately to disagree with it but

to say that although they did not think his opinion right, still it showed a very sufficient knowledge and entitled him to a seat on the Bench. They then pass him, each learned brother shakes him by the hand, and the President addressing him by the title he is to adopt, bids him take his seat on the bench,—*The Yale Law Journal.*

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Law study at Yale:—The catalogue of the Law School, which appeared since our last issue, formally announces the lengthening of the course of regular study here to three years? Beyond all doubt this is a capital move in the right direction. Every condition favors this action now; the enlarged opportunities of attendance at the school, the vigorous growth of our graduate-life, all work in together. It is noticeable that of late older members of the bar all over the country are appealing for a higher standard in the profession, and are bewailing the hosts of new recruits that are rushed into service with such machine-like rapidity No man willingly upbraids his own branch of the service but for this very reason we can hear a peculiar ring of sincerity in the recent words of Judge Field, of the Massachussetts Supreme Court when he noted the great advance in the standard of other lines of work and then added with considerable sadness that this was not true of the law. It is just here that all our law schools are doing their utmost to create better conditions and none more vigourously than the school here. There has been of late year a striking growth of graduate life at Yale, a circle independent of undergraduate life, a community of men who are trying to do more thoughtful, mature work. The added year of law study falls in very aptly with this tendency. A man who means to work may look at the law school course in just two ways—as a sort of manual training school which will carry him through to the bar in the fewest months, or as a period of thoughtful theoretical study which will give him a really deep foundation. Fortunately our schools at Yale and Harvard are making for the latter ideal with a success which is wholly impossible in the rush of a large city like New York.—*The Yale Law Journal.*

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Conspiracy against fellow workman—Civil action—Clemit et al v. Watson, 42 N. E. Rep. 367, (Ind). An agreement made by workmen to quit work unless their employer discharge a man objectionable to them is lawful. No personal liability is incurred in civil or criminal action for the carrying out of such an agreement, in the absence of any threats, violence or intimidation;—*The Yale Law Journal.*

Contract with State—Assignment—Carter v. *State*, 65 N. W. Rep. 422 (S. D.) Where the commissioner of public printing contracted with a firm to do the public printing for the term of one year, and the firm assigned the contract and the assignee sued the State for damages for the breach thereof, it was held that there being no statutory provision to the contrary, such a contract was assignable:—*The Yale Law Journal.*

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The Privileges of Judges:—In the report of Dr. Anderson, an appellee before the British Court of Appeals, occurs this paragraph:—

"I submitted to the Master of the Rolls, who was presiding. 'Then if your Lordship was to order a policeman in court to bring up to you on the Bench a man from the body of the court, and your Lordship were to strike the man in the face, would the striking be a judicial act? And his Lordship replied that it would be a judicial act . . . On August 7th reverting to the point your petitioner had submitted as to whether striking a man in the face would be a judicial act, Lord Esher said, "If I were to order a barrister in the court to sit down, and he did not, and I shot at and killed him, I much doubt if proceedings for murder would lie against me."

This ruling of Lord Esher is important because the jurist has been described as one of the ablest judges of the British Bench.

Possibly a police magistrate of New York had been reading Lord Esher's ruling recently. At all events, it is stated in the New York papers that a Judge Mott of New York said in reference to a case in which a victim of police brutality appealed for protection:

"This man was drunk and disorderly. The police man had a right to arrest him, and to use any force that was necessary to get him to the station house, dead or alive. He had the right to club him, if necessary, and even to kill him."

This may be good law from a British standpoint, but it is not likely to commend itself to Americans generally. It is a dangerous thing to preach such doctrine in a city like New York, where brutal and unjustifiable clubbings have been all too frequent in recent years. The simple fact that a prisoner is intoxicated does not in the opinion of people generally, warrant any policeman in taking the life of the drunken man; and a Judge who justifies such murder is not a safe man to have on the bench.

Just at this time, when such justly indignant protests are being made against the lawlessness of lynching mobs of the rougher sections

of this country, it may be timely to add a word of equal protest against the lawlessness of those who are supposed to represent the law. It is an old saying that extremes meet; but who would have looked to see Lord Esher claim for his court the powers of The Texas lyncher.—*The Albany Law Journal.*

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Contracts—Illegality—Collusive Bidding—McMullan v. *Hoffman* 69 Frd Rep 509 (Oregon). Two bidders on public works enter into a secret contract to avoid competition and to combine their bids in such way as to secure higher price for work and then to divide profits, while appearing to bid against each other. One of the parties was awarded construction of the public works and executed the same and received the profits. The other party now sues for partition of such profits according to contract. The court held such a contract illegal and refused relief.—*The Yale Law Journal.*

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Rights of a dog owner:—Seldom is it, indeed, that we can greet a distinguished Judge of the Supreme Court as a wit of lover of poetry. The study of law allows but little time for the wooing of the Muse while the stern realities of every day practice are not akin to the merry and genial flow of humor. Hence our welcome to a Judge who is both a wit and a lower of poetry for it shows that he, at least, must have a well rounded character and genial soul. Judge Russel, of the Supreme Court, in overruling a demurrer to a complaint on the action of *Woodbridge* v. *Mark* pleasantly discourses on the good qualities and pleasant companionship of dogs, their place in society and their legal status. On this account might we say " And when he ope his mouth let no dog bark." Our only conclusion must be that the writer of the opinion is not only a good judge, but a connoisseur of dogs, even though he acquiesces in that sad opinion which holds that the owner of a slain dog is entitled only to slavage, consisting of the skin of the deceased.

The pertinent part of the opinion of Judge Russel is as follows :—

" The complaint avers that the defendant wrongfully kept several fierce and dangerous dogs, well knowing them to the ferocious, vicious. and of a mischievous disposition and accustomed to attack and bite mankind; that on the 10th day of May, 1895. the said dogs, or some of them, while in the keeping of the defendant as aforesaid, attacked and bit the plaintiff and severally wounded him.

" It will be observed that no allegation is made in addition to the statement of fact as to the character of the dogs and their maintenance

by the defendant, of any active participation by the defendant in the injury, or of any act of negligence on his part.

"It is necessary to add an allegation of this character to the complainant in order to justify recovery?

"There has been much discussion in the books as to the standing of the dog, both as to the right of ownership in him and the limitations under which he may be kept and used. He has become now, if he had not before, a recognized article of property and adopted from the wild stall into that of *feroe domesticoe.* As a pet, companion, watch dog or herder he has his uses, sentimental or otherwise. For his courageous and faithful qualities he has been admired by all walks of mankind and immortalized by eminent writers. More than 300 years before the Christian era, Socrates said of him, 'When I see some men I love my dog the more,' and early in the present century Lord Byron wrote of him.

"But the poor dog, in life the foremost friend
The first to welcome, foremost to defend."

"And again:

'"'Tis sweet to hear the watch dog's honest bark
Bay deep-mouthed welcome as we draw near home."

"At the present day this animal is one of those which are protected by the philanthropy of the society which believes and maintains that the lower animals should be shielded from cruelty as well as the human animal. He is thus recognized as entitled to his proper place in the economy of civilization.

"But what is that place? The answer to this inquiry may solve not only the right of the animal himself as a dog, but also the rights of his owner to use and keep him.

"One of the ablest of the opinions in the jurisprudence of this State upon this subject is written by the late justice W. F. Allen as far back as 1856 in the case of *Wiley* v. *Slater*, 22 Barb 506. In that case the defendant had a dog evidently of superior ability in the fighting line to that of the dog owned by the plaintiff, so that in a fierce contention upon the merits of the respective animals, the defendant's dog succeeded in depriving the plaintiff's dog of his existence. Being a supposably valuable dog, the plaintiff sued the defendant and recovered the value of his dog. It became therefore, necessary for the General Term, upon an appeal being taken from the affirmance by the County Court of the justice's judgment to determine whether, *prima facie* the fact

of the killing justified the recovery, there being no evidence as to which dog was originally the aggressor.

"Justice Allen frankly confessed his incompetency to speak by authority of the code of duels of dogs. He recognized, however, and judicially adopted the poet's commentary on the nature of dogs.

" 'That dogs delight to bark and bite,

For God hath made them so."

and judicially announced the rule that, when dogs fight in pursuance of their disposition to do so, the mere killing of one dog by another does not justify a recovery, and that the owner of a slain dog is entitled only to the slavage, consisting of the skin of the deceased.

"He, however, limits the application of the rule laid down by him by the statement that there was no proof in the case that the dog triumphant was of a vicious or dangerous disposition and the implication fairly is that, if this kind of a character had been proven to exist in the surviving dog, the trial court might have been justified in its judgment.

"This was a case to determine the responsibility of the owner in a controversy between dog and dog. The rule should be stronger as against the owner of the offending animal where the victim of the propensities of the dog is a human being. Conceding the highest place here or hereafter to this companion of man which is claimed by any one, even to the faith of the Indian—?

" 'That in the happy hunting grounds his faithful dog shall bear him company;' still in the walks of life he must give way to the interest of man. Whether this be so or not, as a question of pure ethics, it is recognised by man—made law in Courts administered by man. As against the dog, man has the right of way. It is not a presumption of law or fact that a human being is of a fierce, vicious or dangerous disposition. It is as yet the belief of mankind, recognized and acted upon, that the ordinary nature of human beings has the proper elements of kindness and justice. It therefore, seems to be a necessary deduction that when a fierce, vicious, dangerous animal accustomed to bite mankind, attacks and wounds a human being, the presumption is that the dog is the aggressor and the offender, which presumption may, of course, be rebutted, but, without rebutting proof, must be acted upon as well founded.

"Starting with the presumption, as between the dog and the man, that the facts, stated show the dog to be in the wrong, what is the presumed liability of the owner? It is an undoubted fact that owners

have right to keep fierce and dangerous dogs for the protection of their premises, if so gaurded that they will inflict no injury, except in unusual emergency which justifies their resort to nature's weapons in defence of their master's belongings. Such a state of facts may well be a justification to the owner as well as the dog. But it is not to be presumed without proof and, therefore, upon the ground that, where a fierce, vicious and dangerous dog, accustomed to bite mankind, known to be such by the owner, attacks and wounds a human being, the burden lies upon the master to show the provocation or excuse, the controversy is decided." :—*The Albany Law Journal.*

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Implied Warranty in Life Assurance:—An American Judge has ruled that there is in every policy of Life Assurance an implied warranty on the part of the person taking out the policy that the assured will not terminate his own life (*Retter* v. *The Mutual Life Assurance Company*). His view that the premiums of the office are calculated in the course of ordinary events—of lives running out to their natural termination—that the assured knew it and contracted on the basis of that common understanding. For some pessimists, no doubt, of the Schopenhauer type who are tired of life, a policy for a handsome sum and sucide to follow, presents a very elegible mode of making provision for a family; but surely Life Assurance Companies reckon with this morbid residum in their tables of mortality or ought to do. The sounder method of dealing with the matter is not to postulate an implied warranty. Implied contracts are always dangerous, but to rely on the legal doctrine that a man cannot benefit by his own felony. Suicide if wilful is *felo de se* and in English disentitles the assured to benefit by his own criminal act—that is, disentitles him or rather his estate, to the policy moneys (*Cleaver* v. *the Mutual Reserve Fund*). The doctrine has this advantage too that involving as it does a personal disability only of the wrong doer, it does not prejudice persons claiming through him *bona fide* and for value.

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Mr. Justice Boddam:—The Queen has been pleased to approve the appointment of Mr. Hungerford Tudor Boddam, Barrister-at-law, to be a Judge of the High Court at Madras, in the place of Mr. George Arthur Parker, who has been permitted to retire. Mr. Boddam who is the son of General Boddam of the Bengal Staff Corps, was born in India. He was educated at King's College, London, and went to a private tutor with a view to joining the Indian Civil Service, but becoming a student of the

law, he was called to the Bar at the Inner Temple in 1872 and joined the Oxford Circuit. He read with the late Mr. Justice Archibald, Lord Herschell, Mr. Justice Mathew and Mr. Justice Kekewich. In 1888 he was appointed by Sir Henry James, Prosecuting Counsel for the Mint in Staffordshire. In 1879 he was appointed revising barrister for the Oxford Circuit, a position he has continued to hold to the present time. In 1890 he was appointed Recorder of Newcastle-under-Tyne.

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Women Jurors :—The divorce case of *Aaron Phipps* v. *Jane Phipps* came to an end recently at Clear Lake, S. D. A cross-bill had been filed and the jury found a verdict in favour of the defendant. It seems that all of Clear Lake have taken an interest in this case which lasted several days. Phipps wanted a divorce from his wife on the ground of desertion, and Mrs. Phipps applied for a similar remedy on the ground that her husband had been extremely cruel to her, while the custody of their child was one of the main contentions. The attorney for the plaintiff was notified by one of the women of Clear Lake that the women of that town were very much interested in the Phipps case and wanted very much to sit on the jury, as there seemed to be that privilege accorded them under the laws of South Dakota. The learned Counsel for the plaintiff said that there was no objection, provided the woman had no prejudice and could stand the same test that male jurors must undergo. The Attorney for the defendant was also interviewed, and finally an agreement was reached that the case should be tried by a female jury. Upon the trial the Court-house was crowded, and the women who had been summoned as the taleswomen presented themselves and answered the stern, strict questions which were asked them by the attorneys on both sides. Here is a sample of the questions asked, with answers given; "Would you apply for a divorce if your husband slapped you in the face?" In response came, "I would slap him back again, and if he was not a very big man he would get the worst of it. I do not believe in divorces anyhow. I think husband and wife ought to fight it out at home.

This taleswoman was promptly excused by the Counsel for the plaintiff. The examination of the other women lasted for two days and resulted in many wild questions with correspondingly queer answers. After several days it became evident that it was impossible to obtain twelve women jurors, and so five men were called in and at once accepted. The attorneys demanded that the jury be locked up at the end of the day's testimony, and the order was made and granted by Judge

Andrus. Many of the women on the jury were pretty and attractive and the attention of the spectators was taken from the testimony to an inspection of the charms of the women jurors. Mrs. Phipps told at great length the story of her husband's cruelty, while the women on the jury gave groans and moans after each piece of testimony. When Phipps told how his wife had deserted him, the faces of the female jurors easily expressed the opinion they had formed, "Served you right." The case lasted four days. The seats were hard, the hotel accommodations poor, but the interest and excitement in the proceedings were continued throughout. The case seemed perfectly clear for Mrs. Phipps, but the jury remained all night before they reached a verdict. From the sounds which proceeded from the jury room it was quite evident that the women were deciding the case, and not the men. On the next morning the several women, much bedraggled, came into court. One female member of the jury, in discussing the verdict, is reported to have said that if women's rights meant serving on a jury, she was against it, and preferred home to the jury room. The verdict in the case seemed perfectly in accord with the testimony and the weight of evidence, but the women of South Dakota have evidently already tired of what they formerly prized as a precious privilege. —*The Albany Law Journal.*

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Wearing of high hats by women in theatres:—It is reported that the Ohioan Legislature will surely pass the bill to prohibit the wearing of "obstructions" in the shape of high hats by women, in the theatres, and to subject theatrical managers, who permit their patrons to make nuisances of themselves, in this way, to fines for each offense. Thus the warfare against the theatre hat passes from jest to earnest. The offending women cannot plead that they have not had fair warning. The protest was made good naturedly at first. The obstruction was joked about for years, and considerate women took the hint long ago. They either wore close fitting bonnets or low hats without flaring oranaments to the theatre, or else they removed their hats during the play. The good example of these ladies, however, was not followed as it should have been. Many others continued, and still continue, to wear at the theatre, the same obstructive style of hat that is fashionable street wear; and, therefore, it has been decided to adopt sterner measures with them. If they will not yield to a pleasantly spoken hint or a courteous request, they must listen to a peremptory command. It is quite probable that the action of the Ohioan Legislature will be imitated in other

States, next winter, for the obstructive hats have become a nuisance too great to be disregarded, the patience of both men and women, who are its victims, is worn out, and there is a growing demand that the pleasure of the majority shall be no longer sacrificed to the selfish vanity of the few. Would it not be better for the new woman to observe the niceties as to the removal of their head gear, which men have long been doing?—*The Albany Law Journal.*

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EXECUTION OF FOREIGN JUDGMENTS IN ENGLAND.

[By G. G. Phillimore, Barrister-at-Law. Read before International Law Association.]

First, the main principle of the general theory may be stated thus: When a competent court of one country has given a proper decision upon a case submitted to it, that decision will be recognized and enforced by the court of any other country so far as it can properly do so according to its own law.

It is important to understand at the outset that this is not a maxim of international law. I cannot do better than quote Sir R. Phillimore on this point; "The authority of a judgment in time of peace," he says, "is derived exclusively from the civil law of the territory in which it is given; it cannot, therefore, according to the strict principles of international law, have effect or operation in a foreign territory. But international comity, *sui exigente et hnmanis necessitatibus,* speaks another language, and a foreign judgment is generally in some shape or other upholden and executed by all States. Both from the jurisprudence and the positive enactments of States upon this subject the general axiom may be deducted that no State allows a foreign judgment to be executed within its territory except under the authority and by the order of its own tribunal" (I. L. iv, 727, 728). The principle is thus to be found in the systems of all States; but it is in the method and extent of its practice that there is that lack of uniformity which exists at the present day. The proposition above stated has found a place in English law (not by statute, but by decisions of the courts), but it has been accounted for in two ways, either as being due to comity or as due to obligation.

The former may be said to be the older and now less favored view, but it has the authority of Lord Ellenborough, Sir A. Cockburn and Sir R. Phillimore. To quote the second-named; "Tho comity of nations, by virtue of which alone the judgments of the tribunals of one

country are respected in those of another." (*Castrique* v. *Imrie*, 30 L. J. C., p. 177 [1861]). The first: "By the *comitas gentium* the courts of different countries will recognize and enforce the judgments of each other. *Alves* v. *Banbury*, 4 Camp. 28 1814. And the third: "Though earlier cases exhibit some fluctuation and variety with respect to the application of this doctrine, it has become firmly established by a series of later cases as an unquestionable maxim of our jurisprudence." (*Messina* v. *Petrocochino*, L. R., 4 P. C. 144 [1872]).

The latter, first enunciated by Baron Parke so long ago as 1845, has obtained most hold on English law, and rests on the great authority of Lord Blackburn in *Godard* v. *Gray*, L. R., 6 Q. B.' 139, and *Schilsby* v. *Westerholz*, L. R , 6 Q B., 155 [is 1870] * * * that where a competent court has adjudicated a certain sum to be due, a legal obligation arises to pay that sum, and an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts may be supported and enforced." And the latter: "It is not an admitted principle of the law of nations that a State is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other countries unless there are reciprocal treaties to that effect. But in England, and in those States which are governed by the common law such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by Baron Parke. The judgment of a court of campetent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts in this country are bound to enforce."

This doctrine has been since followed and approved, for instance, in *Abouloff* v. *Oppenheimer*, (10. Q. B. D., 295, 1883), and others. The learned author of 'Smith's Leading Cases,' however, casts some doubt on it as a conclusive theory; and a more accurate view seems to be that suggested by Mr. Piggott, which lies between the two other, which he calls obligation and comity. "There is a legal obligation existing against the debtor in the State where the judgment has been pronounced: the obligation has been destroyed. By reason of the debtor's absence from the jurisdiction of its courts, and there being no property on which execution can issue, the State is unable to enforce the sanction. By virtue of the comity of nations a foreign State, to which the debtor is gone, will clothe the obligation, deprived of its correlative santion, with another sanction auxiliary to it, and by so doing will endue it with the power it has lost." (Foreign Judgments, 2nd ed., p. 15.) And again

(p. 20.) : "The courts of the different States by courtesy enforce, each for the other, not *lex* for *lex* but *jus* for *jus*." Such is the English doctrine.

The English mode of executing a foreign judgment brought before it is thus described by Sir R. Phillimore : "In the event of the foreign judgment being in favour of the plaintiff, and made the foundation of his suit in England, as he cannot issue execution upon it here, he must enforce it by bringing a fresh action for the recovery of what is due to him under the judgment. In that action the judgment forms evidence, or is in the nature of evidence, a contract between the parties. It is important to observe, however, that the foreign judgment does not operate as a merger of the original cause of action, *i.e.* as a *res judicata* ; but if the plaintiff sue on the original ground, it may possibly be competent to the defendant to controvert it, notwithstanding the judgment, though even then it would be *prima facie* evidence for the plaintiff." (I. L. iv. 739). And so Story, C. L. sec. 606 : "The well established present (1874) English doctrine is that a foreign judgment is only *prima facie* evidence in England upon the question whether the foreign court had jurisdiction of the subject-matter, or of the person of the defendant, or whether the judgment was regularly obtained ; but that it is conclusive upon the defendant so far as to prevent him from alleging that the promises upon which it was founded were never made or were obtained by fraud of the plaintiff ; and it is held that any pleas which might have been pleaded to the original action cannot be pleaded to the action upon the judgment."

The chief authority for this view of the foreign judgment is *Houlditch* v. *Marquis of Donegal* (2 Cl. & F. 470 1834), where the Court of Chancery in Ireland was asked to give full effect and benefit to the decree of the Chancery Court in England, but refused as not having jurisdiction. The House of Lords decided that they were wrong, for the latter judgment was only *prima facie* evidence of the cause of action. Lord Brougham said : The language of the opinions on one side has been so strong that we are not warranted in calling it merely the inclination of our lawyers ; it is their decision that in this country a foreign judgment is only a *prima facie*, not conclusive, evidence of a debt—a ground of action."

This doctrine was criticised by Lord Blackburn as follows : "There is no case decided upon such a principle, and the opinions on the other side are at least as strong as those to which Lord Brougham refers. Indeed it is difficult to understand how the common course of pleading is consistent with any notion that the judgment is only evidence. If the judgment were merely considered as evidence of the original cause of

action it must be open to meet it by any counter evidence negativing the existence of the original cause of action, and," he continued "the judgment in itself gives rise, at least *prima facie*, to an obligation to obey that judgment and pay the sum adjudged." (*Godard* v. *Gray*.) And indeed this criticism shows that logically the whole merits of the case could be gone into again, and the foreign judgment ignored, which as we shall see, cannot be. Mr. Piggott says (p. 26) "The judgment, by means of the formal record of it, is the evidence of the existence of the foreign obligation, which it is necessary to bring before the English Court." And by the English practice a foreign judgment is treated as *prima facie* evidence of a debt due by the defendant to the plaintiff. Order III, r. 6, of Rules of the Supreme Court. Annual Practice, 1895, pp. 223, 228. A certified copy of the judgment of the foreign court is required to prove the fact of that judgment (14 and 15 Vict. C. 99 S. 7,1851.

The doctrine, as well as that of non-merger before alluded to, amounts to saying that the foreign judgment, when sued upon, is not, *res judicata* in England. As Chief Justice Wilde said in the *Bank of Australasai* v. *Harding* (19 L. J. C., p. 345 1854. "The judgment may be a merger (*i.e.*, *res judicata*) in the colony because it is conclusive there but when sued on in another country it is only *prima facie* evidence of the debt." The defect in this seems to be exactly hit by Mr. Piggott, who says ; "The most remarkable argument of all is that a debt, confessedly extinguished by the judgment in the country where that judgment was pronounced, is said not to be extinguished in another country. (F. J., p. 30.) And, indeed, if a foreign judgment is not a *res judicata*, then it is practically, on this doctrine, of no effect, as its merits can be gone into.

However, alongside of this doctrine of the non-conclusiveness of a foreign judgment there is this proposition, well established in English law, that an English court, before which a foreign judgment is brought does not sit as a court of appeal from the foreign court, and must not go into the merits of the case. This has been repeatedly laid down by Sir A. Cockburn, Lord Blackburn and Sir Robert Phillimore—*Castrique* v. *Behrens*, 30 L. J. Q., B, 163 1861 ; *Castrique* v. *Imrie* L. R., 4 H. L., 414 1870 *ante* ; *Messina* v. *Petrocochino ante* ; and affirmed in *Vadala* v. *Lawes* 1890, 25 Q. B. D , 306, as an undoubted rule.

Combining these two main principles, a foreign judgment then may be said to be *prima facie* evidence of the cause of action in which it was given, and its merits cannot be gone into. Still the facts of its

not being *res judicata* implies that defences can be raised to it, and it is necessary to see what they are. At this point, however, I must call attention to the effect which, when pleaded by a defendant, in an English court, is given to a foreign judgment, as compared to the position a foreign judgment holds when sued on by the plaintiff.

It is established in English law that a foreign judgment can be pleaded as a *res judicata* in the defendant's favour, and as such is an absolute bar.

Chief Justice Eyre, in *Phillips* v. *Hunter* 2 H. Bl. 402, said: "It is in one way only that the sentence or judgment of a foreign court is examinable here: that is when the party who claims the benefit of it, applies to our courts to enforce it, and thus, voluntarily submits it to our jurisdiction. In all other cases we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us."

Lord Campbell, L. C, in the decision of the House of Lords in *Ricardo* v. *Garcias*, 12 Cl. & F. 368 1845, said: A foreign judgment may be pleaded as *res judicata*, because the foreign tribunal has clearly jurisdiction over the matter, and both parties being before the tribunal which adjudged between them, that is a bar to a suit subsequent in this country for the same cause."

Two important consequences flow from this. First, if the foreign judgment is *res judicata*, that implies that the original cause of action in the foreign country is merged in it. Second, if it is *res judicata*, the plaintiff, against whom it is pleaded, has no reply to it, in other words he is not allowed to show that it is not conclusive. Accordingly, as a plea, a foreign judgment is more respected than it is when made a cause of action.

The reason for this distinction is thus explained and justified by Story, C. L., section 598: "In a writ, brought by a party to enforce a foreign judgment, it is often urged that no sovereign is bound, *jure gentum*, to execute any foreign judgment within his dominions, and therefore if execution of it is sought in his dominions, he is at liberty to examine into the merits of the judgment, and to refuse to give effect to it, if upon such examination it should appear unjust and unfounded. He acts in executing it upon the principles of comity, and has therefore a right to prescribe terms and limits of that comity. But it is otherwise where a defendant sets up a foreign judgment as a bar to proceedings for if it has been pronounced by a competent tribunal and carried into effect, the losing party has no right to institute a suit elsewhere and thus bring the matter again into controversy, and the other party is

not to lose the protection which the foreign judgment gave him. It is then *res judicata*, which ought to be received as conclusive evidence of right, and the *exceptio rei judicatæ* under such circumstances is entitled to universal conclusiveness and respect. This distinction has been very frequently recognized as having a just foundation in international justice."

Nevertheless he makes the following remark, which is noticeable as regards the effect of the proposition he has just laid down upon the doctrine of a foreign judgment not being *res judicata* when sued upon. "If the original cause of action is not merged in a case where the judgment is in favor of the plaintiff, it is difficult to assert that it is merged by a judgment of the foreign court in favor of the defendant"—*i. e.*, if it is *res judicata* in one case it should be in the other.

Mr. Pigott criticises the above statements in a passage too long to reproduce here, but to the following effect; An English judgment is a *res judicata* whether sued upon or pleaded in defense; the only defense or reply allowed to it is that no such judgment ever existed. From the nature of the case it is seldom found that a plaintiff would sue on an English judgment in an English court, as his more appropriate remedy would be execution; and thus the doctrine of *res judicata* has come to be considered as solely a defense. The essence of the principle *res judicata pro veritate habetur* applies equally to a suit by a plaintiff, on a judgment in his favor, as to a defense by the defendant; if it is applied to the one case it should strictly also apply to the other. Therefore whatever is allowed to be pleaded in defense to an action only, foreign judgment should be allowed to be urged by the plaintiff in reply to such defense. The "just foundation in international justice" is not clearly enunciated in any of the authorities, and resolves itself into the statement that the losing party has no right to institute a suit elsewhere but surely it may be said with equal force that the losing party has no right to a fresh adjudication on the suit elsewhere (F. J., pp. 35 39),

Another reason for this distinction was given by Chief Justice Erle in *Barber* v. *Lamb* (8 C. B. N., S. 95), 1860, where the plaintiff had already recovered in a foreign court, and had received payment and was again suing in England on the same cause of action. He said: "The defense here does not rest on the principle of the cause of action being merged in the judgment, but on the principle of there having been judgment by the court to which the plaintiff himself resorted * * * It is contrary to any principle of law for the party who has chosen such tribunal and got what was awarded, to seek a better judgment in respect of the same matter from another tribunal."

This amounts to saying that the plaintiff cannot attack the judgment of the jurisdiction which he chose himself when it has decided against him; and this would be a good reason for refusing to allow the plaintiff to attack the judgment on the score of jurisdiction, but not for refusing him leave to attack the defense, relying on such judgment in any other way in which a defendant can do so against whom a foreign judgment is pleaded. Chief Justice Erle in the same case compared the foreign court to an arbitrator having jurisdiction by consent of parties; but this is not sound, for if the plaintiff has a right to sue in his own country, or in the defendant's country, there is no submission. Common sense, however, suggests one reason for the existence of the distinction—apart from what is certainly another, namely, the inevitable mutual distrust of nations of each other's methods of justice—observed between a foreign judgment treated as a cause of action and treated as a defense. The State which is asked to enforce a foreign judgment is in effect asked to make the judgment its own; it is, therefore, entitled to see that the foreign judgment is not in its essentials at variance with what its own judgment would have been in the matter. Not that this entitles it to treat the case as if there had been no decision in the foreign court previously *i. e.*, investigating the merits but only satisfying itself that common principles of justice have been observed before it allows it to be executed in its jurisdiction. The French phrase employed by M. Constant in this connection, *revision de forme*, seems exactly to convey what the duty of the executing court should be, as opposed to *revision du fond.*

I now come to consider what defenses are allowed in English law to a foreign judgment.

The general rule of defense was thus stated by Lord Blackburn;—"Any thing which negatives the existence of the legal obligation arising from the foreign judgment or excuses the performance of it, must form a good defense to the action." (*Godard* v. *Gray ante.*)

Mr. Piggott thinks this definition is too wide, being capable of infinite extention, because it does not exclude defenses which are undeniably bad, *e.g.* a defense that the foreign court has made a mistake in its application of English law, and suggests the following: "Whatever is a defense to the judgment in the country of its origin will in this country negative the existence of the obligation. If the enforcement of the judgment would involve a violation of English public law that will excuse the performance of the obligation in this country." (p. 104.) It may be doubted, however, whether this meaning cannot be extracted from Lord Blackburn's definition, and whether Mr. Piggott is not merely amplifying the former's rule.

It almost goes without saying that the first requisite of a foreign judgment's right to be considered as conclusive is that it shoud be final. (Re Henderson [1889] 15 App. Ca. 1; that it should have proceeded upon the merits of the case, *Huben* v. *Steiner*, 2 Sc. 304 1835; *Harris* v. *Quine*, L. R., 4 Q. B. 653 [1889]; and that it should fulfil the other characteristics of a *res judicata*, *i e.* identity of subject matter, parties, relief and status of parties, the *corpus juris*, *causa petendi*, and *conditio personarum* necessary to establish the *exceptio rei judicatæ* of Roman law. The fact of the foreign judgment being under appeal makes no difference to its finality, though the English court would then probably postpone its decision. *Plummer* v. *Woodhouse*, 7 D. & R. 25 [1825]; *Paul* v. *Roy*, 21 L. J. Ch. 361, Lord Romilly [1852]; *Castrique* v. *Behrens*, *ante*.

It would be impossible for me, without occupying too much of the time of the conference, to attempt to analyze fully the English decisions treating of defenses to foreign judgments. I propose, therefore, to state the general result of the cases as briefly as I can.

I shall consider first judgments *in personam*—or *inter partes*, to be more accurate—then those *in rem* and status.

The defenses to the first class may be grouped, as Mr. Piggott has done, under the following heads: (*a*) Fraud; (*b*) Error; (*c*) Want of Jurisdiction; (*d*) Want of Natural Justice; (*e*) Violation of English Law; (*f*) Violation of International Law. All these are not equally well established, as we shall see.

(*a*) *Fraud.*

The established rule is that the defense of fraud of parties can be raised to a foreign judgment, even if it involves going into the merits of the case Story C. L., Sec. 603; *Abouloff* v. *Oppenheimer*, *ante*, Brett, L. J., and Coleridge, L. C. J.; *Vadala* v. *Lawes*, *ante* Lindley L. J., on the principles stated by Martin B, in *Cammell* v. *Sewell*, 27 L. J., Ex. 447 1858: "Although it is not permitted to show that the court is mistaken, it may be shown that they were mislead."

The principle laid down by Bramwell B, in *Crawley* v. *Isaacs*, 16 L. T., 529 [1867), that this rule does not extend to a case where perjury was alleged, as that would be a ground of appeal in the foreign court, would not, it seems, now be followed.

So, too, fraud of the foreign court may be alleged, in the sense of wilful error in facts, law or procedure. But it is a difficult plea to establish. In *Castrique* v. *Imrie* Sir A. Cockburn, when attorney-general had given a written opinion, which was laid before the foreign court and deliberately disregarded; but this was held insufficient to entitle

the English court, in which he was sitting as chief justice, to disregard the judgment.

(*b*) *Error*.

Except in the case of wilful error, as above, the general rule is that this cannot be pleaded in defense, whether the mistake of the foreign court is apparent on the face of it, or only deducible from the facts of the case. Sir R. Phillimore and Lord Blackburn differ in opinion as to the effect of a self-evident mistake, the former holding that it will impeach the judgment, the latter that it will not. (*Messina* v. *Petrocochino* and *Godard* v. *Gray*, *ante* 1869). Nor will error in applying the law of the tribunal, or other foreign law or English law, be pleadable (*Dent* v. *Smith*, L. R., 4 Q. B., 414 1851; *Bank of Australasia* v. *Nias*, 16 Q. B., 717 *Castrique* v. *Imrie*, *ante*; *Alivon* v. *Furnival*, 1 C. M, & R, 277, 1834, unless both sides admit that the foreign tribunal made a mistake in the application of its own law, *Meyer* v. *Ralli*, 1 C. P. D., 358 [1876]; which is really no exception to the rule that what is the subject of appeal in a foreign court is not examinable here, although English courts treat the reasons given by foreign courts in their judgments a part of them. *Reimers* v. *Druce* 26 L. J., Ch. 196 [1656]; *Simpson* v. *Fogo*, 32 L. J. Ch. 249 [1863.]

(*c*) *Want of Jurisdiction.*

Where the defendant in a foreign action is actually present in that country and resident there, unless the cause of action relate to land outside that country, the foreign judgment is conclusive of jurisdiction, and no defense can be founded upon that ground, or the doctrine of appeal would be broken, *Schilsby* v. *Westerholz*, Blackburn, J). And the mere presence of the defendant without domicile or residence is enough to found jurisdiction, *Carrick* v. *Hancock*, *Times* law report of November 23rd, 1895 where a Swedish judgment against an Englishman who was merely on a visit te Sweden, was enforced in England. But where the defendant is not resident in the jurisdiction of the foreign court at the beginning of the suit, and judgment is given against him, an English court will examine the competency of the foreign court; and it will, it seems, consider it competent, and will, therefore, enforce its decrees in the following cases:

(*a*) When the absent defendant is domiciled or usually resident in the foreign country (*Schilsby* v. *Westerholz*, *ante*)

(*b*) Where the foreign judgment relates to land in its jurisdiction *Norton* v. *Florence Land Co.*, 7 Ch. D. 332, 1877; *Pitts* v. *La Fontaine*, 5 App. Ca. 564, 1880; and thus an English court is held to have no

right to determine questions relating to the title of foreign land (Buenos Ayres Railway Company's case, 2 Q. B. D. 210, 1877.

(c) When the foreign judgment relates to personal property situate within its jurisdiction, and by its law such property can be attached in order to found jurisdiction (*Fletcher* v. *Rodgers*, 27 W. R., 97, Brett, J., 1878).

(d) When the foreign judgment relates to a contract which is to be performed within its jurisdiction according to the terms thereof: but not if the contract be merely entered into within its jurisdiction without more, as that does not found jurisdiction against an absent defendant (Lord Selborne in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* A. C. 670 1894, and Wright, J., *Tuthill* v. *Walker*, 67 L. T., 767, 1892 when the principle, *actor sequitur forum rei*, applies.

(e) When its judgment relates to foreign contributories to a company existing, within its jurisdiction. (*Leishman* v. *Cochrane*. 12 W. R., 181 1863; *Copin* v. *Adamson*, 1 Ex. D., 17 1875; *Vallee* v. *Doumergue*, 18 L. J., Ex. 598 1849; where French judgments against English shareholders in French companies were enforced.)

(*f*) Where the foreign judgment is given after the plaintiff or defendant has appeared voluntarily and waived the question of jurisdiction. *Novelli* v. *Rossi*, 2 B. & Ad. 757 1831; *De Cosse Brissac* v. *Rathbone* 30 L. J., Ex. 238, 1861). But such appearance will not give jurisdiction where the court had none by International Law. *Oulton* v. *Radcliff*, L. R. 9 C. P., 189, 1874, Brett, J.

(*n*) When the foreign judgment relates to a *tort* committed within or without its jurisdiction by a person domiciled or ordinarily resident within its jurisdiction: subject to its being a *tort* by its own law in the latter case. (The Halley, L. R., 2 P. C., 193, 1868.

The propositions for which I have cited no authority are deduced from their existence in English law under its head of Service of Writs out of the Jurisdiction, from which other instances which found jurisdiction against absent defendants can be ascertained. Order XI of Rules of Supreme Court 1883. I have assumed in all of them that the foreign judgment is warranted by its domestic law; but if it was not, that would be subject of appeal in the foreign country, and so not examinable in England.

The difficulty on this head arises from the fact that there are no universal rules of jurisdiction admitted by all nations. Each nation has its own standard, and its courts decide accordingly. The Committee of your Association in 1883 found it impossible to frame satis-

factory universal rules as to what should found jurisdiction. No doubt unanimity on this point will only be obtained by lapse of time and step by step; but some partial and tentative rule might be adopted in the first place.

(*d*) *Want of Natural Justice.*

This is too vague a defence to be often used with success, especially as the presumption was always declared to be that the foreign judgment was a just one *Buchanan* v. *Rucker*, 9 East, 192, 1808.) Baron Bramwell in one case restricted it to "form of procedure of the foreign court rather than the merits of the particular case." (*Crawley* v. *Isaacs*, *ante.*) And it has been held that a variation between the law under which the judgment is pronounced and that of all other States is not the test of whether justice has been violated or not. (*Fletcher* v. *Rodgers* *ante.* Brett, J.)

On general principles the true view seems to be that every nation has a discretion to make its jurisdiction embrace foreigners in certain cases, and that unless one nation has used its discretion in a glaringly unwise and unreasonable manner, its judgment will not be impeached on account of difference between its law and that of the nation asked to enforce it.

(*e*) *Violation of English Law.*

A tort which is not a tort by English law cannot be the subject of an action in England (The Halley, *ante*), and so a foreign judgment based on a tort by foreign law will not be enforced in English law if it is not actionable thereby. So in *Rousillon* v. *Rousillon*, 14 Ch. D. 351 1880, Fry, J., held that a French judgment condemning defendant to pay damages in compensation for breach of a contract made abroad in restraint of trade in England, could not be enforced in England. And under this head, too, would fall foreign judgments proceeding on the *lex fori* of their country, *e. g.*, on a foreign Statute of Limitations. *Cooper* v. *Earl Waldegrave*, 2 Beav. 282, 1840; *Don* v. *Lippman*, 5 Cl. & F. 1 1837. *ante.*) But as regards other questions of procedure *e. g.*, interests on costs given by a foreign judgment. (*Arnott* v. *Redfern* 3 Bing. 353 1826; *Russell* v. *Smyth*, 9 M. & W. 810 1842.) And so the status of the parties to the foreign action is determined by the foreign law, *Vauquelin* v. *Bonard*, 33 L. J. C., P. 78 1863; though a disqualification attaching to that status by the procedure of the foreign country will be disregarded in an English court. So in *Worms* v. *De Valdon*, 49 L. J., Ch. 261, a French prodigal was allowed to sue by himself in England, 1880.

(f) Violation of International Law.

Where a foreign law, in violation of the universally accepted rule on the subject, is made the foundation for a foreign judgment the latter will not be enforced in England. (*Simpson* v. *Fogo*, where a judgment founded on Lousiana Law was refused recognition on this ground approved in *Liverpool Credit Marine Co* v. *Hunter*, L. R, 3 Ch. A. 479, 1868,

The general result of the foregoing seems to be this: consistently with the principle that the English court will not constitute itself an appeal court from the foreign court, a foreign judgment *inter partes* will be enforced on satisfactory proof being given of (*a*) competence of a foreign court; (*b*) compliance with International Law; (*c*) compatibility with *lex fori.* Fraud may be said to be included in (*a*) or (*b*)

Before passing to judgments *in rem*, it is well to notice two kinds of foreign judgments which are not enforceable in England or in any country, by international practice: (*a*) those based on penal laws (*Folliott* v. *Ogden*, 1 H. Bl. 124 1789; *Nouvio* v. *Freeman*, 1889, 15 App. Cas. 1); (*b*) those based on revenue laws (*Planche* v. *Fletcher*, 1 Dougl. 251, 1779). Westlake is of opinion that a foreign judgment sustaining a claim founded in a breach of English revenue laws would not be enforced in England. It may be remarked that this would also be a violation of public law, and as such not enforceable.

Judgments *in rem* of foreign courts have always been held by English courts to possess a higher value than those *in personam.* Dealing as they do with an object within the jurisdiction, which consequently cannot be questioned, they have been considered as conclusive for most purposes by our courts, certainly when coming before them for recognition. In *Castrique* v. *Imrie* some of the judges were of opinion that a foreign judgment *in rem* could not be questioned, though others thought differently. They embrace, first, what I may call admiralty judgments proper such as property in ships, collisions and salvage and wages; and secondly, prize cases. From the nature of the case the decisions deal rather with the recognition than the enforcement of foreign judgments. But in the City of Mecca, 5 P. D, 28 1879, Sir R. Phillimore laid down the principle that a foreign judgment *in rem* hypothecating the ship to satisfy a lien upon it may be enforced in the Admiralty Court against the ship whenever it comes within the jurisdiction and it can be seized, and he used these significant words; "What the common law courts do indirectly, by implying the contract (*i. e.*, in actions *in personam*), the Admiralty Court does directly without any such implication on the grounds of international comity." (P. 34). And in *Cammell* v. *Sewell* and *Castrique* v. *Imrie* a sale of a ship by order of a foreign court has been held binding and recognized in this country.

In principle, indeed, the only difference between a judgment *in rem* and one *inter partes* is one of extent, not of intrinsic value. "Whereas third parties are entitled to have a judgment *in personam* entirely disregarded as against themselves, they are bound by one *in rem*" (Piggott, F. J., p. 249); and accordingly it follows that all the defences pleadable to the former are pleadable equally to the latter. In practice, however, extent has come to be equivalent to intrinsic value.

I pass over the first class of Judgments *in rem* without further comment, on the ground that they come before English courts almost entirely to be recognized, not enforced. Prize condemnations on the other hand have always been held subject to review by other nations, on the ground that prize courts being international courts must act in accordance with principles of public international law, which is more capable of being ascertained and universally admitted than those of the private law, and thus sentences by prize courts of belligerent nations, sitting in a neutral country, or upon a vessel not *infra præsidia* of the belligerent power, have been refused enforcement. (The Flad Oyen, 8 T. R., 270 n, Lord Stowell 1799; The Henrick and Maria, 4 C, Rob. 43 1799. The American doctrine is the same. *Rose* v. *Himely* [New York] 4 Cranch, 241, Marshall, C. J., 1808.)

As between owners of ships so condemned and purchasers and owners and underwriters, foreign judgments of prize courts are conclusive, if proceeding apparently on a proper ground and not on one not of international validity. *Baring* v. *Clagett*, 3 B. & P. 201 1802; *Hughes* v. *Cornelius*, 2 Shower, 232, 1692; *Baring* v. *Royal Exchange*, A. C. 5, East 99 1804; Lord Ellenborough, in the last case, held that he was bound to give credit to the foreign sentence, which was based upon infraction of treaty [though the inferences in the sentence were drawn from *ex parte* ordinances in aid of the conclusion of such infraction of treaty], although at the same time saying "that the foreign court has construed the treaty iniquitously.") There is more doubt as to the effect of the converse of foreign prize condemnations, viz. acquittals. Story considers them entitled to recognition as much as condemnations; so Lord Kenyon, *Cooke* v. *Scholl*, 5 T. R. 255, 1793. Sir R. Phillimore on the other hand says: "The doctrine of the acquittal being absolute has been questioned, for the acquittal does not, like a conviction, ascertained any precise fact, and may have proceeded on the ground of insufficient evidence." Mr. Piggott agrees with him, on the ground that "an acquittal is really only a judgment *in personam*, as not vesting the property in the owner as against the claimant." (F. J., p. 265.

As regards judgments of foreign courts with regard to the status of persons, they cannot be said to be within the scope of my present sub-

ct. They are brought before English courts to establish certain haracteristics of persons, *e, g.*, that a marriage is good or bad, by an action of divorce; that a child is legitimate or illegitimate; that a person is a lunatic, and that his property is vested in a curator or committee; that a person is a guardian for a minor; that a person is entitled to act as executor or administrator of a deceased person and to control his property under his will or intestacy, or to succeed to his property; that a person is bankrupt, and that his property is vested in his assignee that the bankrupt's debts are cancelled by his discharge from bankruptcy. And although recourse is had to English courts for their confirmation of a foreign decree of status, notably in the case of probate and administration, of guardianship, and divorce, still they are not asked to execute the foreign decree or to enforce its obligation in the strict sense. In the case of a foreign executor suing a debtor of his testator and obtaining judgment against him, and his afterwards demanding execution upon it in England, undoubtedly he would have to obtain probate here, if the debt were an English one, before he could do so. But he would demand execution, not upon the grant of probate by the English court, but upon the foreign judgment given in his favor as possessing a certain status in France, which the grant of probate has extended to England.

Thus, although the English court does make the foreign decree valid here, it does so only as far as the question of personal status is concerned. It does not create an obligation between parties; it at most determines the personal status of two parties, as in marriage. For this reason I omit all reference to the treatment of foreign judgments concerning status by the English courts.

It now remains to gather up the result of the proceeding survey of the English practice on this subject in as few words as possible.

The theory of the execution of foreign judgments is fully admitted and established in English law, and is due to comity enforcing the obligation created by the foreign judgment. The foreign judgment is regarded as *prima facie* evidence of the cause of action; that *prima facie* effect may be displaced by showing that it has been obtained by fraud, or that it is contrary to principles of international or public law, or was made without due jurisdiction. At the same time the merits of the foreign judgment will not be examined, and the English court will not constitute itself a court of appeal from the foreign court. A foreign judgment, when pleaded by the defendant in answer to an English action, if it contains all the requisites of *res judicata*, will be considered as such, and will conclude the plaintiff. The latter cannot in his reply attack that plea of *res judicata.*

The requirements of a foreign judgment are, as said above (*a*), competence of the court (*b*), compliance with international law (*c*), compatibility with English law.

When we compare English law with that of foreign States we find the same conditions apparently as exist in our system. Of course I have no personal knowledge of the foreign systems, and advance the following remarks very much under correction. My authority of them is M. Constant's book, "Execution des Jugements Etrangers," second edition, 1890, where the foreign systems are concisely stated.

Foreign States may be classified thus with regard to this point: (*a*) States fettered with no conditions; (*b*) States which exact reciprocity; (*c*) States which exact reciprocity secured by treaty.

As instances of (*a*) Italy and France may be quoted. The former by its Code requires; (1) That the foreign court should be competent; (2) that the parties were regularly cited; (3) that they were either regularly represented or regularly made default; (4) that the enforcement of the judgment is not in violation of public domestic law and order. It should not be forgotten that the treatment accorded to foreigners by the Italian Code is of the most liberal kind, and that Italy made diplomatic advances to other nations on this subject in 1884.

France makes no conditions of executing foreign judgments, except that none can be of any effect until made executory by a French court. I gather from M. Constant that the former tendency of the French courts was to exact *revision du fond* before granting their *exequatur*, but that the latter decisions have modified this; and though *revision du fond* can be claimed at discretion, and has been recently said to be the duty of the courts, his own opinion is (and is supported by authority) that French judges should confine their examinations of the foreign judgments presented to them for execution to the following points: (*a*) If the foreign judgment has been given by a competent court; (*b*) if the due procedure has been followed; (*c*) if the rights of defense have been respected; (*d*) if the decision does not disturb public order and morals.

(*b*) Germany is an example of a State which insists upon reciprocity as a condition precedent. That condition being satisfied, *exequatur* is granted to a foreign judgment provided (1) that the foreign judgment is final; (2) that its execution does not entail an act forbidden by German law; (3) that the court pronouncing the judgment is competent according to German principles; (4) that the debtor is not a German who has made default, unless notice has previously been given to him personally in the country of the judgment, or in Germany by *lettres rogatoires*,

(c) Russia insists on reciprocity secured by treaty: if that exists no *examen du fond* is allowed. Belgium, where it has a treaty with another country based on reciprocal execution of judgments, requires the following: (a) compatibility with public order according to the principles of Belgian public order; (b) fact of judgment being *res judicata*; (c) proof of authenticity of judgment; (d) respect of rights of defense; (e) fact that foreign court is not solely competent in the matter owing to the plaintiff's nationality. In other cases *revision du fond* takes place..

It will be found, I think, that all nations will come under one or other of the foregoing heads. I have cited enough, I hope, to show that there are common principles on this subject recognized and enforced by every nation.. The only difference between them all is the point at which those principles are allowed to be put into force, Some insist on reciprocity as a condition of executing justice, others insist on reciprocity secured by treaty, others confine themselves to treaty only. The only difficulty in the way of a general understanding being adopted lies in the various preliminary safeguards which different nations think necessary for securing the rights of its citizens.

The only way of removing these different safe-guards is to replace them by general one. This is only possible either by every nation making treaties with every other to admit the principle of reciprocity or by an international consensus on the subject.

No doubt there are many difficulties in the way of arriving at a general agreement on all points, especially that arising from questions of jurisdiction, as Mr. Alexander pointed out at the 1892 Conference; but it would be a great step towards a full understanding being adopted on this subject even to reach the stage of an international Conference, however partial the first results might be, as being an admission that some arrangement of some international kind is practicable. If the great majority of nations have been able to agree upon international regulations for the navigation of their ships at sea; if it has been found possible to codify international rules for the regulation of General Average which was the work of your association; when, as there, so here, all that is required is to give a general international form and sanction to rules which are practically similar in all states, and which are common to them all, and to so connect them in one whole, there is surely ground to hope that there will not be much longer delay to carry into effect an international agreement on a point on which it must be to the advantage of all nations to draw into closer connection with each other.—*The Albany Law Journal.*